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In the Supreme Court of the United States

OCTOBER TERM, 1964

VICTOR G. WALKER, WARDEN
LOUISIANA STATE PENITENTIARY, ANGOLA,
LOUISIANA
(Since succeeded by H. L. Hanchey),
Petitioner,

v.

WOODMAN J. COLLINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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v.

WOODMAN J. COLLINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

H. L. Hanchey, successor to Victor G. Walker, as Warden of Louisiana State Penitentiary, Angola, Louisiana, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeal for the Fifth Circuit, entered in the above entitled case on March 11, 1964 and July 21, 1964.

OPINIONS BELOW

The judgment of the United States District Court is reported in 215 F. Supp 805. A copy of the judgment and reasons for judgment is attached hereto as Appendix I-A and I-B. The judgment of the Circuit Court of Appeal rendered December 6, 1963 which was subsequently withdrawn is unreported. A copy of said judgment and the reasons for

same is attached hereto as Appendix II-A and II-B. A copy of the amended and supplemental petition for rehearing, is attached hereto as Appendix III-A. The substituted opinion-order of the Circuit Court of Appeal is reported in 329 F. 2d 100. A copy of said opinion-order and the reasons for same is attached hereto as Appendix III-B. A copy of the second amended and supplemental petition for rehearing, the judgment thereon, and the reasons for same are attached hereto as Appendix IV-A, IV-B and IV-C.

JURISDICTION

The judgment of the Circuit Court of Appeal was originally entered on December 6, 1963. The opinion-order of the Circuit Court of Appeal withdrawing its opinion on the original hearing and substituting an opinion-order refusing the first petition for rehearing was rendered on March 11, 1964. The judgment of the Circuit Court of Appeal refusing the second petition for rehearing was rendered on July 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a sincere, purposeful, good faith inclusion of qualified Negroes in a Grand Jury list without planned limitation as to the number included result in discrimination and thus in a denial of equal protection of the laws under the Fourteenth Amendment?

2. Is it discriminatory and a denial of equal protection of the laws for a jury commission charged with the responsibility of selecting a Grand Jury list

of qualified persons to intentionally strive to include in the list members of both the white and Negro race so as to achieve a reasonably representative cross-section of the population of the community?

3. On principle how can purposeful inclusion of qualified members of the various races be permissible if the list to be compiled is to contain three hundred names, but be prohibited if it is to contain twenty names, when in either case actual selection of jurors from the list is by lot?

4. How can a constitutional jury be formed in either a state or federal court if jury commissioners may not intentionally include members of various races in the jury list from which the jurors are to be drawn by lot?

STATEMENT OF THE CASE

On October 5, 1960, Woodman J. Collins was indicted by a Grand Jury for the crime of aggravated rape. After a full trial by jury he was convicted and sentenced to death. His conviction and sentence was affirmed on appeal to the Supreme Court of Louisiana. *State v. Collins*, 242 La. 704, 138 So. 2d 546. Certiorari to the Supreme Court of the United States was denied, 371 U.S. 843. A writ of habeas corpus under 28 U.S.C. 2254 was sought from the United States District Court for the Eastern District of Louisiana on the grounds that his conviction was violative of the constitution of the United States. At the hearing the entire record from the State Court was ordered filed in evidence. No additional evidence was offered

by either party but both presented oral argument. The District Court denied the application for habeas corpus. *Collins v. Walker*, E.D. La 1963, 275 F. Supp. 805. Thereafter Collins prosecuted an appeal to the United States Court of Appeal, Fifth Circuit. The Court of Appeal on December 6, 1963, in its opinion (which was later withdrawn and substituted) reversed the District Court and remanded the case on the ground that in the organization of the Grand Jury which indicted Collins, there was discrimination against him because of his race or color. District Judge Dawkins concurred specially on other grounds. Respondent petitioned for a rehearing which was denied on March 11, 1964, at which time the opinions on original hearing were withdrawn and an opinion-order substituted. This opinion-order also reversed and remanded on the ground that in the organization of the Grand Jury there was discrimination against Collins, a Negro, because of his race, in that the jury commissioners in selecting the Grand Jury list purposefully included Negroes in the list because they knew the Grand Jury to be drawn therefrom was scheduled to consider the Collins case. *Collins v. Walker*, C.A. 5th 329 F. 2d 100. Respondents petitioned for a second rehearing in which objection was made to substantial errors of fact concerning the selection of the Grand Jury list contained in the Court's substituted opinion. The second petition for rehearing was denied July 21, 1964. The majority opinion by Judge Rives concurred in specially by Judge Jones, held that even under respondent's version of the facts

the result was the same, i.e., the purposeful inclusion of Negroes on the list from which the Grand Jury was drawn was a fatal defect in the indictment, citing primarily as its authority *Cassell v. Texas*, 1950, 339 U.S. 282. Judge Dawkins filed a written dissent to the denial of the second petition for rehearing and withdrew his former concurrence in the original opinion and the second or substituted opinion.

The matter is now before this Court on a petition for a Writ of Certiorari filed by H. L. Hanchey, successor to Victor G. Walker, as Warden of the Louisiana State Penitentiary.

REASON FOR GRANTING THE WRIT

I.

The majority opinion of the Court below is based primarily, if not wholly, on dicta contained in *Cassell v. Texas*, 339 U.S. 282 (1950) and is in direct conflict with this Court's decision in *Akins v. Texas*, 325 U.S. 398 (1945). This conflict is pinpointed and analyzed in the vigorous dissenting opinion of Judge Dawkins (Appendix IV-C infra, page 123). In *Akins* the jury commissioners charged with selecting a Grand Jury list of sixteen names intentionally placed one Negro on the list from which twelve grand jurors were drawn. This Court held that this fact did not prove discrimination. In the instant case the jury commissioners intentionally placed Negroes on the Grand Jury list of twenty names, from which a Grand Jury of twelve was to be empaneled. From this list of twenty the trial judge appointed the foreman and the other

eleven grand jurors were selected by lot from the remaining nineteen names. In compiling the jury list each commissioner acted independently. There was no plan or agreement between them as to how many Negroes were to be included. The result was that six Negroes were included on the list. The procedure for selection of a grand jury list which was followed in this case is found in L.R.S. 15:180, as amended Act 303 of 1952, (since amended by Act 161 of 1964) (Appendix V-B infra page 166).

The majority below citing the *Cassell* case held that the purposeful placement of Negroes on the list of twenty was standing alone, a fatal defect (Appendix IV-C infra page 120). If the rule of *Cassell* is what the majority below contends, then it is obvious that it cannot be limited in its application only to cases where a grand jury list of twenty is required to be selected (as the majority attempts to do) (Appendix IV-C infra page 121). This is so because of the many decisions of this Court which hold the constitutional mandate against discrimination applies to both grand juries and petit juries. The decision of the majority must necessarily extend to all jury lists, grand or petit, and to all such lists regardless of the number of names included, from which juries are to be drawn. That is, unless a majority of this Court is now prepared to hold, as the majority below apparently has, that members of both races may be purposefully included in jury lists only when the number of each included is sufficient to give the accused a mathematical chance of a jury being drawn composed of all Negro, all

white, or any combination in between. The lack of this chance is the only damage the accused in this case could have conceivably suffered under the findings of the Court below. It is interesting to note that the lack of this chance was set out as an example of the evil to be found in purposeful inclusion of Negroes in a list of twenty names by the majority in its original opinion, which was subsequently withdrawn (Appendix II-B infra Page 40). Under this reasoning would a list composed of twelve Negroes and twelve whites be perfect?

This case brings to this Court a very serious question. A question that cannot be limited to this case alone, and one which is not answered by the recent act of the Legislature of Louisiana (Act No. 161 of 1964, Section 180) which changes the method of selecting the grand jury list by providing that the list shall be selected by lot from the general venire list (which contains three hundred names) immediately after it is completed (L.R.S. 15:180, as amended Act No. 161 of 1964) (Appendix V-C infra p. 167). The jury commissioners must still select the general venire list thus the basic problem is not solved (L.R.S. 15:179, as amended Act 303 of 1952) (Appendix V-A infra p. 165).

For this Court to let the lower court's decision stand is to cast grave doubt on the constitutionality of past convictions of felons both white and Negro in cases in which no harm can be shown to have resulted from the way the jury lists were compiled. The *Cassell* case was decided in 1950. As this Court

well knows since that time untold numbers of grand and petit juries, both state and federal, have been empaneled from jury lists prepared by jury commissioners who purposefully included members of the various races found in their respective communities. This was done in a good faith effort to follow the mandates of this Court pronounced in such cases as *Brown v. Allen*, 344 U.S. 443 (1953) and *Hernandez v. Texas*, 347 U.S. 475 (1954) which followed the *Cassell* case. How else could the jury commissioners comply? In this case it is crystal clear that the majority falls in error by equating *purposeful inclusion* on a representative basis with *systematic exclusion* and *token inclusion* which are forbidden by the Fourteenth Amendment.

II.

The majority below seeks to establish new standards for compiling jury lists. Standards which as a practical matter are impossible to attain. Judge Jones appears to have recognized this problem in his specially concurring opinion (Appendix IV-C infra Page 122) and Judge Dawkins in his dissenting opinion deals with it at length (Appendix IV-C infra Page 134).

The majority in its zeal to protect the rights of a group, which has heretofore been the object of discrimination by systematic exclusion and token inclusion of its members on jury lists, now blindly strikes down the only practical way, if not the only possible way to cure the injustices of the past. That is, purposeful inclusion of a representative number without lim-

itation by plan or design. Selection by lot from a list so compiled provides equal protection for all. Witness this case where six Negroes were placed on a list of twenty and five of them were drawn to serve on the jury of twelve. This clearly illustrates that the size of the list is not the key to equality for all. A jury list which contains a representative cross-section of the community from which jurors are selected by lot approaches absolute equality as close as is practical regardless of how the list is compiled. While this may be more than the Constitution requires how can one who benefits by it and who offers no proof of harm be heard to complain. *Fay v. New York*, 322 U.S. 261 (1947).

Also bearing on this problem is the fact that under Louisiana law prospective jurors must be able to read and be of good moral character among other things: (L.R.S. 15:179-180 supra). It is obvious that a jury commissioner cannot learn if a particular person meets all of these qualifications and not at the same time learn his color or race. It is equally obvious that once the person's race is known the jury commissioner must either purposefully include him or purposefully exclude him. There is no other alternative, because every act of man is both conscious and purposeful.

Thus it is apparent that the majority opinion in this case makes it virtually impossible for jury commissioners to compile a constitutional jury list. This is especially true in areas which have by custom or

tradition had all white juries for years. The time has come for this Court to draw positive and clear guidelines covering this question so that confidence can be restored in the enforcement of the criminal laws against those who are charged with the commission of heinous crimes. That the Court below has not done so is clear from Judge Jones' specially concurring opinion which reads in part as follows:

> ". . . Thus it seems perhaps Negroes must be included in the general venire list, although it will be assumed that this is not done purposefully lest the Constitution be infringed. . ." (Appendix IV-C infra Page 122).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX No. I-A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

WOODMAN J. COLLINS

MISCELLANEOUS

v.

NUMBER 664

VICTOR G. WALKER

JUDGMENT

This cause came on to be heard on application of petitioner, Woodman J. Collins, for the issuance of a writ of habeas corpus, was argued by counsel, and taken under submission by the Court on December 7, 1962.

In consideration of the record herein, the arguments of counsel, the entire transcript of the State Court proceedings in this matter, and the briefs of counsel filed herein:

IT IS ORDERED, ADJUDGED, AND DECREED that the application of petitioner, Woodman J. Collins, for the issuance of a writ of habeas corpus be, and it is hereby, DENIED.

Baton Rouge, Louisiana, April 3, 1963.

(s) E. GORDON WEST
United States District Judge

APPENDIX No. I-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

WOODMAN J. COLLINS, Relator

MISCELLANEOUS

v.

NUMBER 664

VICTOR WALKER, Respondent

REASONS FOR JUDGMENT

This is an application filed on behalf of petitioner, Woodman J. Collins, for the issuance of a writ of habeas corpus. Petitioner is presently incarcerated at the Louisiana State Penitentiary, under death sentence, as a result of having been convicted by a jury in a court of proper jurisdiction of the State of Louisiana on April 19, 1961 of the crime of aggravated rape. He was sentenced by the judge of that court on June 21, 1961, to "suffer the death penalty". During his trial, many bills of exception were reserved on his behalf, and subsequent to his being sentenced, all available state court appellate procedures were exhausted to no avail. This present application for the issuance of a writ of habeas corpus was filed on November 14, 1962, at which time respondents were ordered to refrain from executing the judgment imposing the death sentence pending a determination of the merits of this petition, and to show cause on December 7, 1962, why the writ of habeas corpus applied for should not issue.

Extensive arguments were presented by respective counsel and exhaustive briefs were filed. In essence, petitioner now contends that his constitutional rights were violated (1) because when the grand jury which indicted him was empaneled, the jury commission deliberately included in the 20 names from which the grand jury of 12 was drawn, the names of 6 Negroes, and that this resulted in a "disproportionate amount of Negro representation" on the grand jury, and (2) because this grand jury was specially selected to investigate this petitioner when he should have been investigated by the regularly empaneled preceding grand jury, and (3) because the trial court concluded that the petitioner was sane at the time of the commission of the crime and at the time of the trial when in fact he was not, and (4) because the trial court improperly admitted in evidence a confession which, although admittedly signed by petitioner, was obviously not composed by him nor understood by him.

It is a well settled rule of law that petitioner had the burden of establishing alleged discrimination against a race in the selection of a grand jury. *Akins v. State of Texas*, 65 S. Ct. 1176.

After hearing oral arguments, the court ordered counsel to file in this record a complete transcript of all state court proceedings in this matter, which was done. In accordance with law, *Brown v. Allen*, 73 S. Ct. 397, this court has diligently reviewed and exhaustively studied the entire transcript, composed of 465

pages, and has made its own independent findings and conclusions based upon this record, the arguments of counsel, and the briefs filed herein. It is the conclusion of this court, based upon this examination, that petitioner's contentions are entirely without merit and that he has failed to show any deprivation of his constitutional rights during any of the preceedings involved in this case.

The transcript of the record in this case shows the following facts. Petitioner was indicted on October 5, 1960, with having committed the crimes of aggravated rape and attempted murder on April 7, 1960, in violation of the laws of the State of Louisiana. He had been arrested on April 8, 1960, the day following the alleged commission of the crime, and booked with aggravated rape, aggravated kidnapping, and attempted murder. At the time of his arrest, a regularly empaneled grand jury for the Parish of Jefferson Davis was in session, this grand jury having been empaneled on March 21, 1960, to serve for a period of six months. It happened, as will hereinafter be shown, that there were no Negroes serving on this particular grand jury. Quite obviously, had this petitioner been investigated by that particular grand jury, and had a true bill been returned, the State would most certainly have been met with the objection that his constitutional rights had been violated because of the fact that there were no Negroes included on that grand jury or in the grand jury venire list at that time. Consequently, rather than present the

investigation of this petitioner to that grand jury, under those circumstances, he was held over until the convening of the next regular grand jury on October 5, 1960. When the grand jury on October 5, 1960, was empaneled, the usual procedure for empaneling the grand jury was employed. This consisted of the individual members of the jury commission submitting a certain number of names of persons from their respective wards to be on the grand jury venire list, so that this number totaled 20 names. When these names were submitted by the jury commissioners, there were included therein the names of 6 Negroes and the names of 14 white people. From this list of 20 names, in accordance with the usual procedures, 12 names were drawn by lot to constitute the grand jury. When these names were drawn, there were 7 white persons and 5 Negroes whose names were drawn and who ultimately constituted the grand jury which was duly empaneled to serve for the period of six months from October 5, 1960. This grand jury investigated the charges pending against petitioner, and after due deliberations, they returned two true bills, one charging the petitioner with aggravated rape, and one charging the petitioner with attempted murder.

Prior to the date of arraignment, counsel for petitioner excepted to the composition of the grand jury, and filed a motion to quash the general venire list, the grand jury venire, the grand jury, and the indictment. This motion was filed on October 20, 1960, and the court set the matter for argument and hearing on October 31, 1960. A full hearing was held on

October 31, 1960, at which time counsel for petitioner called as witnesses five members of the jury commission of Jefferson Davis Parish. A review of the testimony given by these five witnesses, all of which is contained in the transcript hereinabove referred to, shows conclusively, and without any doubt, that there was no evidence of systematic exclusion or systematic inclusion of members of the Negro race on the grand jury venire list used in that Parish. (It is also patent upon the face of this transcript that there were likewise no irregularities in the make-up of the petit juries used in that Parish, but this needs no further comment because there is no question being raised in these proceedings as to any deficiency or irregularity in the make-up of the petit jury.) The testimony shows that each jury commissioner represents certain wards in his parish. The regular venire list, from which the petit jury is selected, consists of 300 names, which list is subject to deletions and additions from time to time. There is no question from the evidence but what this general venire list regularly contained the names of Negroes without any attempt having been made by the jury commission to systematically exclude or include members of either race. The testimony of these five witnesses further shows that in addition to the 300 names placed on the general venire list, an additional list of 20 names is similarly compiled by the jury commissioners from which list the grand jury is selected to serve for a term of six months. In compiling and submitting the list of 20 names from which the grand jury is to be chosen, the jury commission

takes into consideration the sufficiency of the education of the person being considered, whether or not the person has any prior convictions, whether or not he is of average intelligence or better, his standing in the community, and whether or not he is considered to be an average citizen or better. This, briefly, is the criteria used by the jury commissioners in selecting names to be submitted as prospective grand jurors. The testimony further shows that on practically every grand jury that these witnesses could remember, with the exception of the one immediately preceding the grand jury which investigated petitioner, the names of varying numbers of Negroes had been included, and, in most instances, Negroes actually served on the grand juries as ultimately empaneled. There was no indication of any kind in the testimony that the names of certain Negroes were used over and over again, or that there was any conscious effort to limit or control the number of Negroes whose names were included on the jury list. These witnesses testified that the grand jury which had been empaneled in March of 1960 did not, in fact, have any Negroes on it, but that this was an exception to the general rule in that parish. For some reason or other, it seems that each member of the jury commission was under the erroneous impression that the other members were submitting the names of Negroes on that particular jury list, and as a result, there just simply were no Negroes' names submitted on that particular list. But the fact that on one particular grand jury there happened to be no Negroes' names certainly does not warrant the conclusion that this parish was engaged in a

regular, systematic exclusion or inclusion of Negroes on their grand juries. From the testimony, the exact opposite conclusion must be drawn. There was a very conscious effort made by the officials of this parish, as is clearly shown by this testimony, to make sure that each grand jury was truly representative of both the Negro and white citizens of the parish.

Petitioner now contends that because of the fact that the members of the jury commission knew that the petitioner, who was a Negro, was to be investigated, they made a conscious and determined effort to use a different system in the selection of this particular grand jury than the system usually used. I find no evidence to support such a contention. The fact that there happened to have been more Negroes on this grand jury than there were on some of the previous grand juries is certainly no indication that there was a systematic inclusion or exclusion of Negroes on the grand jury list, or that there was any effort made in this instance to deprive this petitioner of any constitutional rights to which he was entitled. As a matter of fact, it was interesting during the argument of this case to hear the response of petitioner's counsel to the question of whether or not there would have been objection raised had petitioner's case been presented to the prior grand jury, which was regularly empaneled, but which contained no Negroes. Counsel informed the Court that an objection most certainly would have been raised on the grounds that there were no Negroes on that jury. As was stated by the court in *State v. Green*, 60 So. 2d 208, "It would be falla-

cious, we think, to hold that because jury commissioners, being conscious of the necessity of giving consideration to members of the colored race, as well as those of other races, in the selection of all juries in order to comply with the guarantees of the Fourteenth Amendment to the Federal Constitution, have purposely included Negroes on a jury panel, their forthright action constitutes discrimination in the absence of a showing that there was a planned limitation upon the number of Negroes to be chosen." It is obvious, of course, that this petitioner can have no valid complaint concerning the composition of the prior grand jury since it did not investigate his case. Whether or not that grand jury was improperly constituted can have no bearing on this case unless its composition evidenced a plan of systematic inclusion or exclusion of Negroes from grand juries generally in this parish. As stated previously herein, no such conclusion can be drawn from the facts in this case, because the evidence clearly and conclusively shows that over the years the grand juries in this particular parish have been properly constituted with proper representation being had thereon of both the white and Negro citizens of that parish. The testimony was uncontradicted to the effect that the members of the jury commission had consistently endeavored to see that both races were properly represented on all juries selected. They had been instructed by both the judge and the district attorney, from time to time, that they were to see that colored people, as well as white people, were represented on all grand juries and petit juries in that

parish, and that they were to be selected without regard to race or color. This testimony was neither refuted nor contradicted by either direct testimony or by inference. It was, as a mater of fact, established during this hearing that the population of Jefferson Davis Parish is approximately 75 per cent white and 25 per cent colored. While it has been held that there is no requirement that the whites and Negroes on a grand jury or petit jury bear the same relationship, percentage-wise, as the white and colored population in the area, nevertheless, it is interesting to note that it happened in this particular case that the proportion was fairly close to the overall proportion of the white and colored population. This court sees no validity whatsoever to petitioner's claim that a "disproportionate amount of Negro representation" was included in this particular grand jury. The testimony was uncontradicted to the effect that there was no attempt whatsoever made to establish or maintain any direct proportion between white people and colored people on these grand juries or petit juries, and it was further established that every member of this jury commission, consistently, with the one exception of the grand jury selected on March 21, 1960, submitted the names of Negroes from their particular ward or wards for inclusion in the grand jury list. Consequently, after a thorough and complete study of all of this testimony, I find absolutely no merit whatsoever to this contention of the petitioner. The jury commission of this parish undoubtedly performed its job in accordance with law and conscientiously selected names and

empaneled juries without regard to race or color. This exception to the make-up of the grand jury was argued by counsel for petitioner in the Supreme Court of the State of Louisiana, and that court also found that there was no evidence of systematic inclusion or exclusion of Negroes when the grand jury which investigated petitioner was empaneled, and that therefore, there was absolutely no evidence whatsoever of any deprivation of petitioner's constitutional rights. The case of *Cassell v. Texas*, 70 S. Ct. 629, cited by counsel for petitioner, is simply not applicable to the facts established in this case. Here there was no deliberate or systematic attempt made by the jury commission to have Negroes and whites proportionately represented on the grand jury, but by the same token, there was certainly no denial of such proportionate representation because of discrimination. It was entirely possible for the grand jury in this case to have been finally empaneled with a disproportionate representation of either whites or Negroes, or it could have been finally empaneled on a perfectly proportionate basis, depending entirely on the outcome of the final selection by lot. This grand jury was fairly and impartially selected without regard to race or color as required by law.

It was apparently argued in the Supreme Court of the State of Louisiana that the petitioner had also been subjected to an undue delay by having been held over until the grand jury of October, 1960, was empaneled. The Louisiana courts found no merit to this contention, and it is merely mentioned here in passing because of the fact that this point has not been

raised in the present application for the writ of habeas corpus. But in the event that such an issue had been raised here, this court would find no merit to such contention under the circumstances here presented. There is no evidence that petitioner was in any way prejudiced by such delay. *Brown v. Allen, supra.*

After the arguments concerning the make-up of the grand jury were heard by the state trial court, and decided adversely to petitioner, counsel for petitioner then requested that a lunacy commission be appointed to examine petitioner and to report to the court concerning his sanity. The State, through the prosecuting attorney, joined in this request and a lunacy commission was immediately appointed by the Court. The petitioner was remanded to the East Louisiana State Hospital, where he underwent various tests and examinations by qualified psychiatrists. As a matter of fact, Dr. Charles E. Sturm, a psychiatrist, testified that he had examined and interviewed the petitioner some 25 or 30 times, and that in addition to his examinations, all of the staff doctors of the East Louisiana State Hospital had examined this petitioner and found him sane both at the time of the commission of the crime, and at the time of the trial. This staff consisted of seven doctors, all of whom were residents in psychiatry. In answer to a question by the court, Dr. Sturm stated that this petitioner was "just an uneducated colored boy" and that "he could distinguish right from wrong just as well as you and I". The testimony in this connection revealed that not only had eight psychiatrists examined this petitioner,

but he had also been examined by a psychologist to whom he had been referred for further examination by Dr. Sturm. It was the unanimous opinion of all of these experts that this petitioner was completely sane and capable of distinguishing right from wrong both at the time of the commission of the crime and at the time of his hearing, and that he was fully capable of assisting his counsel in the defense of this suit. There was absolutely no testimony to the contrary. Consequently, this record makes it abundantly clear that there is no merit to the contention of petitioner that he was deprived of his constitutional rights because of the fact that the trial judge concluded, from the evidence, that he was neither insane at the time of the commission of the crime nor at the time of his trial. There was certainly amply evidence upon which to base this conclusion.

After the testimony of the members of the lunacy commission was heard, and the defendant was pronounced sane, he pleaded "not guilty by reason of insanity", to both the charge of aggravated rape and to the charge of attempted murder. At that time, the case against him on the charge of aggravated rape was set down for trial on April 17, 1961. On that date, the petit jury was selected, without incident or objection, and the case proceeded to trial on April 18 and 19, 1961. At the conclusion of the trial, the jury returned a verdict finding the defendant "guilty as charged", and on June 21, 1961, in accordance with the law of Louisiana, the defendant was sentenced by the court to "suffer the death penalty". The final

contention of petitioner's counsel now is that the trial court improperly admitted in evidence, during his trial, a confession admittedly signed by petitioner. He claims, however, that the confession is couched in such language that, considering the low mentality and lack of education of petitioner, he obviously could not have composed it, nor could he have comprehended or understood it. Again, the question of this confession was thoroughly explored during the trial of this case, and there was, of course, no evidence that the petitioner physically wrote the confession. There was, however, no dispute about the fact that he signed it. The fact is, and the evidence clearly establishes, that the confession was freely and voluntarily given by petitioner and signed freely and voluntarily by him. There is no evidence to the contrary. The evidence clearly establishes that this petitioner was able to understand the import of the confession, and that he was able to understand and differentiate right from wrong. It is not the province of this court to concern itself with the weight to be given such a confession, but only to concern itself with the question of whether or not the use of such a confession constituted a violation of the petitioner's constitutional rights. This court concludes that no such violation of constitutional rights is involved by virtue of the use of the confession referred to during the trial of this case. The petitioner, both at the time of the commission of the crime, and at the time of trial, was possessed of all of his faculties, and was able to distinguish right from wrong. He was able to assist in

the defense of his case, and was fully aware of the meaning of his confession. There is simply no merit to petitioner's contention that the use of this confession in any way violated his constitutional rights.

As required by law, this court has made its own independent examination of this matter, and has made its own independent findings and conclusions. Petitioner has failed to prove that he was in any way deprived of any constitutionally guaranteed rights, and thus his application for the issuance of a writ of habeas corpus must be denied.

JUDGMENT ACCORDINGLY.

Baton Rouge, Louisiana, March 29, 1963.

(s) E. GORDON WEST
United States District Judge

APPENDIX No. II-A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20537

D. C. Docket No. 664—Misc. Pauper

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause

be, and the same is hereby, reversed, judgment here rendered in accordance with the holdings of the opinion; and that this cause be, and it is hereby remanded for any further proceedings which may be found necessary or proper.

It is further ordered and adjudged that the appellee, Victor G. Walker, Warden, Louisiana State Penitentiary, Angola, Louisiana, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Dawkins, Jr., District Judge, Concurs Specially"

December 6, 1963

Issued as Mandate: Mar. 19, 1964

Court Costs:
Docket Fee of $25.00 payable by Appellee to Clerk, U. S. Court of Appeals.

APPENDIX No. II-B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(December 6, 1963.)

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

RIVES, Circuit Judge: Collins, a Negro, was convicted and sentenced to death under an indictment charging him with aggravated rape upon a white woman. The conviction and death sentence were affirmed by the Supreme Court of Louisiana. *State v. Collins*, 1962, 138 So.2d 547. Certiorari to the Supreme Court of the United States was denied, 371 U.S. 843.

His petition for habeas corpus to the United States District Court claimed that his conviction was

violative of the Constitution of the United States in three respects: 1) He was discriminated against because of his race or color in the organization of the grand jury which indicted him; 2) he was mentally unable to stand trial, an imbecile not able to assist counsel in his defense; 3) his conviction was procured in part by an unconstitutionally coerced confession.

Each of these contentions had been raised and decided against him upon his trial and upon appeal to the State Supreme Court. It is therefore properly conceded that he has satisfied the requirement of 28 U.S.C.A. §2254, that state remedies be exhausted before a federal court may grant an application for habeas corpus. 28 U.S.C.A. §2254; *Brown v. Allen*, 1953, 344 U.S. 443, 447-450; *Fay v. Noia*, 1963, 372 U.S. 391, 426, et seq.

At the request of the district court, a copy of the record and transcript of proceedings in the State courts was presented and filed with the district court. Upon the basis of that record and transcript, and without taking additional evidence, the district court denied the application for habeas corpus. *Collins v. Walker*, E.D. La. 1963, 215 F.Supp. 805. Thereafter, the district judge issued a certificate of probable cause in accordance with 28 U.S.C.A. §2253, and permitted the prosecution of this appeal in forma pauperis.

It is settled that a federal district court may, in its discretion, refuse the writ of habeas corpus without hearing additional evidence, if the court is satisfied,

by an examination of the record and proceedings in the State court, that the issues have been adequately litigated, that the state process has given fair consideration to the issues and the evidence, and has resulted in a legally satisfactory conclusion, and that no unusual circumstances calling for a hearing are presented. *Brown v. Allen, supra*, 344 U.S. at 463. The Supreme Court has, however, recently emphasized that "Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts." *Fay v. Noia, supra*, 372 U.S. at 422. The Supreme Court in *Townsend v. Sain*, 1963, 372 U.S. 293, 313, set forth the tests with more particularity:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

On the first question, that of racially discriminatory organization of the grand jury, we agree with

the district court that the evidence introduced in the state court proceedings was adequate, indeed undisputed, but we reach a conclusion opposite to that reached by the state courts and by the district court.

1) Indictment is the only method provided by the law of Louisiana for the institution of the prosecution of a capital offense. La.Rev.St. Title 15, §2. A jury commission for each parish is selected and appointed by the district judge. La.Rev.St. 15:175. At the time ordered by the district judge, the jury commission meets at the office of the clerk of the district court and selects from the persons qualified to serve as jurors for their parish three hundred persons as the "general venire list." La.Rev.St. 179. The next section provides the method of selecting a grand jury.

"§180. *Selection of grand jury*

"Immediately after completing the general venire list, the commission shall select *therefrom* the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled.

"The names of the persons so selected shall be written on slips of paper, by the clerk, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and indorse thereon the words: 'List of Grand Jurors.' " (Emphasis supplied.)

Negroes constitute a substantial proportion of

the population of Jefferson Davis Parish. Mr. Arceneaux, the member of the Jury Commission from Ward 2, testified that the population in that ward was about 75% white and 25% Negro, that being the "heaviest concentration of colored people in Jefferson Davis Parish."

Mr. Arceneaux had served on the Jury Commission since 1958. In that year the Jury Commission prepared the original "general venire list" of 300 persons.

"Q. Would you tell the court what sort of instructions you were given and who gave them to you?

"A. When we were appointed on the Committee we were given instructions as to who was eligible and ineligible for jury duty by written instructions from the Judge. We have been from time to time reminded by the Judge that in picking the jury to just be careful that there should be both white and colored members on the jury. Other than this I would say we've had no instructions."

Some Negroes were included in this original list of 300 but Mr. Arceneaux did not recall how many. "We have met twice annually for the choosing of additional names to add to the lst (sic) to replace the juries that have been drawn out of that original list."

Mr. Arceneaux further testified:

"Q. Now, have there been three grand and petit juries drawn from this list since it was prepared?

"A. From that list, no.

"Q. How many have been drawn or do you know?

"A. I think there would have been five grand juries drawn since we've been on. It's either four or five.

"Q. Now, Mr. Arceneaux—

"A. They are not taken from that list of three hundred.

"Q. Sir?

"A. That grand jury was not picked out of that original group of three hundred.

"Q. It was not?

"A. No.

"Q. How was that—

"A. The grand jury is picked by names in the additions to the three hundred.

"Q. In additions to the three hundred?

"A. Correct."

Again Mr. Arceneaux testified:

"Q. Do you have any idea how many colored people are presently in the venire list of three hundred?

"A. That would be a hard question to answer. I don't know I could even give an estimate because we have drawn a lot of the original names and it would be hard—well, it would be impossible for any individual member of the Commission to say, because the names when they are submitted are not submitted as colored or white, they're submitted as names and we know in our selection

what they are but when they are put in the box there is no way in distinguishing between them.

"Q. But when you do draw the grand jury out you do know whether they are colored or white?

"A. The grand jury is named before the names are put in the box, yes, we do know whether they are colored or white.

"Q. Now, as I understand it, when you prepare the grand jury you don't look in the box of three hundred and select out twenty names? You simply get together and you all select twenty names, period, and put them on there. Is that right?

"A. That's correct."

As each grand jury was selected, the Jury Commission was instructed by Mr. Charles A. Pitre, the Clerk of the District Court, that some Negroes should be included. As Mr. Arceneaux testified:

"A. That instruction, each time that we had met, has come from Mr. Pitre that there should be some colored representation on each grand jury.

"Q. I see.

"A. But not any specific instructions other than that we should attempt to do that each time."

At the time of Collins' arrest on April 8, 1960, there had been recently empaneled for Jefferson Davis Parish a regular grand jury for the six months com-

mencing March 21, 1960. There was no Negro on that grand jury for the reason thus stated by Mr. Arceneaux:

"Q. Now do you know what reason why you did not put any on the grand jury immediately prior to the grand jury under which this man was indicted?

"A. I had put some on the previous and I was depending on some one else to put someone on the previous grand jury and in the course of events when we funished putting the names in it turned out that all of us had depended on someone else putting the names in and it so happened none of us did."

Mr. Arceneaux further testified:

"Q. Now, Mr. Arceneaux, how many Negroes did you put on the grand jury panel or the twenty names prior to this particular one and prior to the one that you failed to put anyone on? About how many had you—

"A. I think that I had always put at least one on the grand jury panel on all of the grand juries that have been selected except the one immediately preceeding (sic) the present grand jury."

Collins' case was not presented to the grand jury empaneled when he was arrested, but instead he was held in jail for six months until October 5, 1960, at which time six Negroes were purposely placed on the

list of twenty names,[1] from which the district judge drew a grand jury composed of five Negroes and seven whites.

It was this grand jury which indicted Collins for aggravated rape and also for aggravated kidnapping and attempted murder. No other case was presented to this grand jury.

The State's position was that, instead of systematic *exclusion* of Negroes from the grand jury which returned the indictment, there was a purposeful *inclusion* of Negroes. As said by the State trial judge: "It seems entirely reasonable to this Court that the Jury Commission in noting its error of failing to have any Negroes on a Grand Jury did attempt to remedy this error by placing more Negroes on the subsequent Grand Jury."

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[1] Mr. Ströhe, the member of the Jury Commission from Wards 6 and 7, testified that there were very few Negroes in Ward 7, but about 30% of the population of Ward 6 was colored. He further testified:

"Q. . . . Now, do you recall how many Negroes were put on the grand jury venire of twenty names which is the present grand jury?

"A. Actually of the five of us we have our Wards designated and we feel responsible for those particular Wards, and to say exactly how many was put on, I wouldn't know but I can speak for myself for 6 and 7.

"Q. Well how many were put on from 6 and 7?

"A. I think one from 6 and none from 7. . . ."

Mr. Johnnie Robert Benoit, the Jury Commission member representing Wards 5, 8 and 9, testified that on the list of 20 names from which the court drew the grand jury which indicted Collins:

"Q. And how many did you put on?

"A. I put two white man (sic) and one negro which I figured was fair to this man."

The Louisiana Supreme Court held that this method of selecting a grand jury did not offend the Constitution of the United States, and quoted from its previous holding in *State v. Green*, La. 1952, 60 So.2d 208, 212, as follows:

> " 'It would be fallacious, we think, to hold that, because jury commissioners, being conscious of the necessity of giving consideration to members of the colored race, as well as those of other races, in the selection of all juries in order to comply with the guarantees of the Fourteenth Amendment to the Federal Constitution, have purposely included Negroes on a jury panel, their forthright action constitutes discrimination in the absence of a showing that there was a planned limitation upon the number of Negroes to be chosen.' (221 La. at 726, 60 So.2d at 212.)"

State v. Collins, *supra*, 138 So.2d at 551.

We do not agree. In the *Green* case, the Louisiana Supreme Court attempted to distinguish the case of *Cassell v. Texas*, 1950, 339 U.S. 282 (see 60 So.2d at 212). In the instant case, the federal district judge held the *Cassell* case not applicable on its facts (215 F.Supp. at 809). While we would concede that the *Cassell* case is dintinguishable on its facts, it is important to note that the Supreme Court, in its opinion, carefully stated the principle that: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." 339 U.S. at 287.

That the use of this language was deliberate and well studied is shown by the concurring opinion of Mr. Justice Frankfurter:

> "The prohibition of the Constitution against discrimination because of color does not require in and of itself the presence of a Negro on a jury. But neither is it satisfied by Negro representation arbitrarily limited to one. It is not a question of presence on a grand jury nor absence from it. *The basis of selection cannot consciously take color into account.*" (Emphasis supplied.)

339 U.S. at 295.

On principle, we think that must be true. A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. In the historic langu ge of the elder Mr. Justice Harlan:

> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Plessy v. Ferguson, 1896, 163 U.S. 537, 559.

An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an accused is entitled to demand under the Constitution is that in organizing the grand jury there shall be no

discrimination against him because of his race or color—*Martin v. Texas*, 1906, 200 U.S. 316, 321.

The Supreme Court has frowned on the use of white tickets to indicate prospective white jurors and yellow tickets to indicate Negroes.

> "Petitioner's charge of discrimination in the jury selection in this case springs from the Jury Commissioners' use of white and yellow tickets. Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate."

Avery v. Georgia, 1953, 345 U.S. 559, 562.

State courts and jury commissions may find somewhat contradictory or confusing the doctrine forbidding the consideration of color as a basis for selecting a venire of jurors and the rule which we stated in *United States ex rel. Seals v. Wiman*, 5 Cir. 1962, 304 F.2d 53, 67, that "very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion of Negroes from jury service. *Brown v. Allen*, 1953, 344 U.S. 443, 471, 73 S.Ct. 397, 97 L.Ed. 469." The reconciliation lies in the observance of the positive, affirmative duty resting upon jury commissioners and other public officials expressed in *Avery v. Georgia*, *supra*, 345 U.S. 559, 561:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a pro-

> cedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill v. Texas*, 316 U.S. 400, 404 (1942)."

Also quoted in *United States ex rel. Seals v. Wiman*, *supra*, 304 F.2d at 66.

Compliance with that duty inevitably results in meeting the evidentiary test prescribed in *United States ex rel. Seals v. Wiman*, *supra*. The two rules may appear conflicting or confusing when attention is focused on the evidentiary test, but not when there is a good faith effort to comply with the constitutional mandate for which that test is prescribed.

The prohibition is often referred to as being against the systematic exclusion of Negroes from jury service because of their race or color. Systematic *inclusion* of any limited number of Negroes because of race means, however, a corresponding systematic exclusion of Negroes from the remaining number on the venire. For example, while improbable, it is by no means impossible that a grand jury drawn from the general venire list of 300, assuming that list to be prepared without racial discrimination, might have contained more Negroes than the five who sat on the grand jury which indicted Collins.

An opposite and somewhat paradoxical consideration is that the conscious taking into account of race or color as a basis of jury selection may result in injury from the sometimes over-ready complaisance of members of the race of the accused. To paraphrase the language of Mr. Justice Jackson, concurring in the

result in *Shepherd v. State of Florida*, 1951, 341 U.S. 50, 55: "I do not see, as a practical matter, how any Negro on the grand jury would have dared to vote against indicting Collins for a capital offense. The only chance Collins had may have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought." Any effort to give to the accused more than the equal protection of the laws may thus well have the practical result of giving somewhat less than equal protection.

Moreover, it is important to note that the guarantee of the Constitution is to "the equal protection *of the laws*." In the four or five grand juries drawn for Jefferson Davis Parish since 1958, the jury commissioners had made no pretense of selecting the names of twenty citizens *from* the general venire list as required by law. La.Rev.Stat. 15:180, quoted *supra*, p. 3. Instead, the commissioners each placed in the list of twenty the names of such Negroes from the Parish at large as "I figured was fair to this man."[2] No matter how benevolent and well-intentioned the jury commissioners may have been, the accused cannot be required to accept their individual sense of fairness in the place of the equal protection *of the laws* to which he is entitled.

We conclude that in the organization of the grand

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[2] Testimony of Jury Commissioner Benoit at record p. 153.

jury which indicted Collins, there was discrimination against him because of his race or color.

Since the judgment of the district court must be reversed and the cause remanded to await a possible reindictment and retrial of Collins, it is not absolutely necessary to decide the other two questions presented by this appeal. True, those questions will probably arise on any subsequent retrial of Collins. Hence, sound judicial administration would ordinarily require that they be considered on this appeal. The difficulty, however, is that, in our opinion, the record is not adequate for their determination. We think that, under the principles heretofore stated (pp. 2 and 3, *supra*), the district court erred in not affording Collins an evidentiary hearing on those two questions.

Perhaps the most important factual consideration upon which each of those questions must be determined is Collins' mental capacity. Dr. Charles E. Sturm, the psychiatrist in charge of the State Criminal Colony at the State Hospital in Jackson, Louisiana, when first introduced as a witness, testified that, accepting the three classifications of moron, imbecile and idiot, he would classify Collins as an imbecile with a mental age range in the vicinity of ten to twelve; that Collins had an I.Q. of 63 (R. p. 170); and that "His performance would seem to indicate a chronic brain syndrome" (R. p. 176).

Dr. Sturm later testified that in stating Collins' I.Q. as 63, which would be feeble-minded (R. p. 347), he had relied on a report from a psychologist to whom

he had sent Collins for an I.Q. test, a Mr. Lockridge, and that "He has said that that is not right. He's told me that today. He has said that it should be something in the vicinity of 80. Now, if that is true, your guess is just as good as mine."

Dr. Sturm further testified that a Dr. S. L. Pollock of New Orleans had made a neurological and psychological examination of Collins which "ruled out" a chronic brain syndrome (R. p. 361). Based upon the reports of Dr. Pollock and Mr. Lockridge, Dr. Sturm changed his opinion, and testified:

> "He [Dr. Pollock] said that the neurological examination was completely within normal limits and he found no evidence of a chronic brain syndrome. Now, when we got that report, Mr. Lockridge changed his mind. Considering the changing of his mind the IQ went up. So where, in his opinion, it should be in the vicinity of 80 instead of 63. And because the IQ went up to 80 I'll say that he is not a mental defective case now. He's just an uneducated colored boy."

Neither Mr. Lockridge nor Dr. Pollock testified on the trial in the State court. Their testimony appears only by way of hearsay. The State trial judge commented:

> "Defense counsel did not object to this hearsay information. At the time of the trial Defense Counsel asked to have Mr. Lockridge subpoenaed for the trial of the case. Mr. Lockridge was subpoenaed and was sequestered for two days as a witness during the trial. However, it developed that Mr. Lockridge's re-examination disclosed

> that Woodman J. Collins had a substantially higher I.Q. that (sic) the first test indicated. It is perhaps for that reason that the defendant's counsel did not see fit to call Mr. Lockridge and he was released without testifying."

The federal district court should not have relied upon such a record, particularly in a case involving the ultimate issue of life or death. To hold Collins to the ordinary rules of an adversary trial in failing to call Mr. Lockridge as a witness seems to us, in effect, to prejudge Collins' mental capacity to stand trial.

The present record being so totally inadequate, we forego a decision on the other two questions presented by this appeal.

Notwithstanding our holding that the indictment against Collins is unconstitutional and void, Collins is now legally detained upon his commitment to await the action of another grand jury. Collins is, of course, entitled to be tried within a reasonable time, and the district court should retain jurisdiction to meet the unlikely event that further orders and judgments may be necessary or proper. This Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State of Louisiana an opportunity to take the necessary steps to reindict and retry Collins.

Any such reindictment must of course be by a grand jury from which Negroes have been neither systematically excluded nor included. For the guidance of the parties, the Court expresses the present opin-

ion that if Collins is reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Louisiana, subject to possible review by the Supreme Court of the United States or upon other habeas corpus proceedings.

The judgment of the district court is reversed, judgment here rendered in accordance with the holdings of this opinion, and the cause remanded for any further proceedings which may be found necessary or proper.

REVERSED, RENDERED, and REMANDED.

DAWKINS, JR., District Judge,

Concurring specially:

I concur in the result reached by the majority here, but respectfully base my action upon different grounds.

Since at least 1837, when the Supreme Court decided *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, in an unbroken line of cases, that Court has refused to consider constitutional questions when the record discloses other grounds for decision, whether or not they properly were raised by the parties. Some of the later cases reiterating this fundamental principle of judicial action are *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947) (which at 331 U.S. 568-575 sets forth all of the cogent reasons for this policy); *Peters v. Hobby*,

349 U.S. 331, at 338, 75 S.Ct. 790, 99 L.Ed. 1129 (1955); *Neese v. So. Ry. Co.*, 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955); *Clay v. Sun Insurance Office*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed. 2d 1170 (1960) vacating judgment at 265 F. 2d 522 (5 Cir.); and, most recently, *Bush v. Texas*, 372 U.S. 586, at 590, 83 S.Ct. 922, 9 L.Ed. 2d 958 (decided March 25, 1963).

In at least two decisions by this Court in recent years, this principle has been followed: *Byers v. Byers*, 254 F. 2d 205 (1958); and *Lone Star Import, Inc. v. Citroen Cars Corp.*, 288 F. 2d 69 (1961), where it was said:

> "* * * Whatever may be the temptations—or the inability to resist them—in adjudicating ordinary matters either of fact or statutory construction courts are especially cautioned against the determination of constitutional questions not inescapably presented where some other basis less profound is actually available as a ground of disposition. * * *"

Here, although mentioned in passing, and not the basis for the majority opinion, reference has been made to a simple *legal* ground upon which I think we ought to decree the nullity of the indictment under which appellant was convicted, without reaching the constitutional question.

La. Rev. Stat., Title 15:180 provides the method by which State grand juries shall be drawn:

> "Immediately after completing the general venire list, the commission *shall* select *therefrom*

the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled.

"The names of the persons so selected shall be written on slips of paper, by the clerk, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and indorse thereon the words: 'List of Grand Jurors.'" (Emphasis supplied.)

It is to be noted that this statute expressly provides that the jury commission "shall" select the twenty persons from which the grand jury is drawn from the "general venire list" of 300 persons, provided for by La. Rev. Stat., Title 15:179. The word "shall" is mandatory, as so used. The Louisiana Supreme Court has held in two cases that where the Legislature, in establishing the method by which grand juries are to be drawn, uses the word "shall," such is mandatory, not merely directory, language; and if not followed literally, any indictments returned by such illegally constituted bodies are absolute nullities. *State v. Kifer*, 186 La. 674, 173 So. 169 (1937) and *State v. McLean*, 30 So. 2d 187 (1947).

In this case, as pointed out by the majority opinion, the jury commissioners violated the express, mandatory requirement of the statute in *not* selecting the 20 names from the "general venire list." Instead they selected the names of 20 persons in addition to the

three hundred on the general list. Therefore, having violated the State law, in my opinion, and according to the Louisiana jurisprudence, this indictment was a nullity. It is on that basis—and that alone—that I respectfully, and with full deference to the majority, submit that we should base our ruling. It is a mistake, I feel, that the constitutional question is considered at all; and it is my further opinion, without elaborating,* that the majority is basing its constitutional rul-

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* It is difficult, indeed, to reconcile this Court's present holding that there constitutionally can be no "conscious inclusion" of Negroes on jury lists with earlier statements by the Supreme Court, *and by this Court.*

In *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942), then Chief Justice Stone, speaking for a unanimous Court, made the following statement at 316 U.S. 404:

> "We think petitioner made out a prima facie case, which the State failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we pointed out in *Smith v. Texas, supra*, 131, chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more. *The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875, 8 U.S.C. § 44, and fully established since the decision in 1881 of NEAL V. DELAWARE, SUPRA—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds: Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessary results where there are qualified negroes available for jury service.* ***" (Emphasis added.)

ing upon dicta in *Cassell*, since that case involved systematic *exclusion*, not *inclusion* of Negroes.

Otherwise, I fully agree with what the majority has said, and hereby enter my special concurrence.

On May 30, 1962 (reh. den. June 29, 1962), in *United States v. Wiman*, 304 F. 2d 53, at page 60, this Court said:

"Prior to 1960, the Commissioners personally handed out the majority of the pink application cards (the remaining applicants came by the office), and they handed them out only one at a time to individuals whom they knew, although on one or two occasions Commissioner Allen thought he had asked a Negro minister for the names of qualified Negroes. The only sources of Negro applicants the Commissioners could name were the waiters at Morrison's Cafeteria, the Negroes working at the downtown hotels, those at the shoe shine parlors, mail carriers, and a few they came in contact with through business. Commissioner Allen noted that they often choose names from the rosters of various organizations such as the Junior Chamber of Commerce or the Kiwanis Club. When asked if he had ever used the roster of a Negro club or association, he replied no, that no one had ever given him one. Both the Commissioners admitted that the bulk of their friends, social contacts, and acquaintances were white. *On the basis of this evidence we see no sufficient effort to solicit the names of qualified Negroes beyond the admittedly narrow circle of ordinary contacts of the Commissioners.*" (Emphasis added.)

To say the least, jury commissioners are being placed in a virtually insoluble dilemma, where a constitutional jury list may be an impossibility.

APPENDIX No. III-A

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

AMENDED AND SUPPLEMENTAL PETITION FOR REHEARING

JACK P. F. GREMILLION,
Attorney General, State of Louisiana.

CARROLL BUCK,
First Assistant Attorney General.

HARRY FULLER,
Second Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,
Appellant,

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,
Appellee.

AMENDED AND SUPPLEMENTAL PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The defendant-appellee herein, the warden of the Louisiana State Penitentiary, presents this supplemental and amended petition for rehearing in the above and entitled numbered cause, and in support thereof, respectfully shows:

I.

The majority opinion leaves no criteria for selection of grand jurors in the State of Louisiana, where the accused is a person of color. Dicta in *Cassell v. Texas*, 339 U. S. 282, cited in the majority opinion as authority for its ruling to the effect that the selection of the grand jury in the present case constituted a systematic exclusion of Negroes and, hence, was un-

constitutional is erroneous, because the Cassell case involved a systematic exclusion of Negroes, not a systematic inclusion of Negroes. The majority opinion gives an incorrect interpretation to the concurring opinion of Justice Frankfurter which is quoted by the majority in this case. At the outset, Justice Frankfurter was indulging in dicta. Although he stated that the prohibition against discrimination because of color is not satisfied by Negro representation arbitrarily limited to one, he did say that the basis of selection cannot *consciously* take color into account. Jury commissioners, of course, are conscious of the necessity of giving consideration to qualified members of the colored or Negro race, or any other race, as well as other rights, in order to comply with the guarantees of the Fourteenth Amendment of the Federal Constitution (*State v. Green*, La. 1952, 60 So. 2d 208, 221 La. 713; *Hill v. Texas*, 316 U.S. 400). Therefore, purposely including Negroes on a jury panel does not constitute discrimination in the absence of showing that there was a planned limitation upon the number of Negroes chosen. A strict construction of the language used by Justice Frankfurter in the Cassell case would mean, in part, that a jury commission could not consciously give any consideration to color at all. This would do violence to all well known jurisprudence on the subject of discrimination. There is nothing in the record of this case to show that there was any planned limitation upon the number of Negroes or persons of any other race to be chosen on this particular grand jury.

II.

In the concurring opinion of Judge Dawkins, Jr., he referred to the mandatory provisions (see Page 21 of the opinion) of LRS 15:180 relative to the selection of twenty citizens from the general venire list from which the grand jury is to be selected. We submit that the only thing in the record from which the conclusion might have been drawn is testimony given by Mr. Arceneaux, one of the members of the jury commission, to the effect that the grand jury was "picked" by names in additions to the three hundred. (See page 6 of opinion). Obviously Mr. Arceneaux was mistaken in this part of his testimony because a certified copy of the proces verbal of the proceedings of the jury commission reflect that the twenty names selected to serve as grand jurors for the term beginning Wednesday, October 5, 1960, were actually taken from the general venire list of three hundred as provided by LRS 15:180. We attach hereto a certified copy of the said proces verbal (Exhibit #1) and submit that the testimony of jury commissioner Arceneaux, quoted at length in the majority opinion, is erroneous and is not borne out by the actual facts and records of the case.

III.

We submit that a review of the above mentioned proces verbal will show that it does not reflect the race of any name on the general venire list, (either by designation as such or identification of race by different colored slips of paper), the list from which

the grand jury is selected, the petit jury selected, etc. Therefore, there could be no conscientious, inclusion or exclusion of Negroes as members of the grand jury or the test of race, in the picking of the twenty names from the general venire list from which the grand jury was selected.

IV.

The majority opinion at Page 9 indicates that "the district judge drew a grand jury composed of five Negroes and seven whites." This was the grand jury which indicted Collins in this case. This is clearly erroneous because Louisiana law provides that the district judge shall appoint the foreman of the grand jury from the list of twenty names, and the remaining eleven members of the grand jury are drawn by lot from the envelope, (the contents not viewable by anyone) containing the remaining nineteen names. (See LRS 15:183). Since the names were drawn by lot, there was no way of telling in advance how many whites and how many Negroes would be on the impaneled grand jury.

V.

If the grand jury had actually been selected according to Mr. Arceneaux's version, it would certainly have been objected to and raised in the district court, at the time the motion to quash the grand jury was tried. If the testimony of Mr. Arceneaux was correct, certainly the Louisiana Supreme Court, as well as the district court, would have sustained the motion

to quash the indictment on the ground that the grand jury had been improperly selected.

VI.

The court erred in holding that when five Negroes were "put" on the grand jury, the said Negroes would not dare vote against indicting an accused Negro. This is tantamount to saying, in our opinion, that the grand jury should have been composed entirely of white persons because, if as the court said, they would be the only persons of sufficient standing to face and live down the odium among their white neighbors. It would appear that if a grand jury should be composed of white persons only for the reasons assigned by the majority opinion, it would amount to a systematic exclusion of Negroes from a grand jury in all cases where the accused is a Negro.

VII.

LRS 15:203 provides in part that defects or irregularities in the manner of selecting juries, both grand and petit, or in the composition, summoning, or proceedings of the jury commission, shall not be sufficient to set aside the venire unless some fraud has been practiced or some great wrong committed that would work irreparable injury. We submit that there is no evidence of great wrong, or any wrong, in this record. Certainly, the fact that five members of the grand jury were Negroes could not possibly work an irreparable injury to Collins, an accused Negro, because if this were true, it would then be impossible to ever indict a member of the Negro race without vio-

lating his alleged rights merely because a member of his race was a member of the grand jury that considered his indictment. This would result in a prohibition where a State could never meet the constitutional requirements of the Fourteenth Amendment because a grand jury was composed of members of a certain race considering the indictment of a person, the member of the same race; in other words, if no members of the Negro race were selected as members of the grand jury, the court would undoubtedly quash the indictment for that reason, and on the other hand, if Negroes were included on the grand jury, the court would likewise quash the indictment if the opinion of the court in this case is allowed to stand.

VIII.

We wish to call the attention of the Court to the case of *Hill v. Texas*, cited in the opinion of this Honorable Court in footnote on Page 22, in which the Supreme Court of the United States held in effect that jury commissioners could obtain information relative to qualified Negroes serving on venire lists and that if jury commissioners did not perform this duty they would be in violation of their constitutional duty.

In *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942), then Chief Justice Stone, speaking for a unanimous Court, made the following statement at 316 U.S. 404:

> "We think petitioner made out a prima facie case, which the State failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we

pointed out in *Smith v. Texas*, *supra*, 131, chance or accident could hardly have accounted for the continuous omission of Negroes from the grand jury lists for so long a period as sixteen years or more. The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any Negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875, 8 U.S.C. § 44, and fully established since the decision in 1881 of *Neal v. Delaware*, *supra*—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.***" (Emphasis added.)

IX.

It is further submitted that the special concurring opinion is erroneous in that the reason given for reversal therein is a lack of compliance with R. S. 15:180, which, in effect, is purely a procedural matter in the composition of grand juries based entirely upon a State statute and as further stated in the con-

curring opinion, no constitutional questions need be entertained.

28 U.S.C.A. 2241 (C) (3) states that the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws or treaties of the United States. R. S. 15:180, even if expressly violated in this case, is not a part of the Constitution, laws or treaties of the United States, and therefore is not a ground upon which a convicted prisoner may be released on application for a writ of habeas corpus.

X.

It has been stated in many previous cases that a State could constitutionally fail to provide a grand jury in any case, regardless of the possible sentence that could ultimately be imposed, and that such act would not be in violation of the United States Constitution or laws or treaties of the United States, therefore any irregularities therein would likewise not be in violation of the Constitution, laws or treaties of the United States, and in view of this, it is respectfully submitted that once a prisoner is convicted upon trial, it must be shown that his trial or some portion of it violated his constitutional rights, for the reason that he is being held by virtue of his conviction at time of trial, and not by any indictment rendered by a grand jury. (See Memorandum of Authorities in Support of Defendant's Motion to Dismiss, filed in the U. S. District Court, Eastern District of Louisiana, Baton Rouge Division.)

XI.

The Court in the majority opinion was erroneous in concluding that (See Page 16 of the Opinion) "The District Court erred in not affording Collins an evidentiary hearing on the question of sanity and the fact that his conviction was procured in part by a unconstitutional coerced confession." The record shows that Collins was granted two hearings in the State Court on the matter of his sanity. Likewise the record reflects that the State Court thoroughly considered the admissibility of Collins' confession before allowing it to go before the trial jury. At the hearing in the United States District Court counsel for Collins offered a written brief and oral argument but did not offer, nor did they attempt to offer, any evidentiary evidence on these two questions. The Minute Entry of December 7, 1962, will show that the Court (Judge West) at his request asked for the entire record to be submitted to that Court. It was agreed by all counsel that this would make up the record. To now hold that the United States District Court should have granted Collins evidentiary hearings on these questions would require practically a new trial in the United States District Court, when in fact the record as made up in the 31st Judicial District Court of Louisiana constituted the entire proceedings on those questions before the United States District Court. (See Page 2, 9, 10, 11 and 12 of United States District Judge West's opinion in this case).

Unless this record reflects the violation of a federal right this Court cannot go beyond the record as

it is constituted, as it is conclusively controlling on appeal. (See *Willis v. Hunter* 166 F.2nd 721, certiorari denied 68 S.Ct. 1499, 334 U.S. 848.) We do not think that it is proper for the federal courts to require the trial of a defendant first in state court and then after exhausting all appeal remedies (including a complete review by the Louisiana State Supreme Court) then to commence new trial proceedings in the federal courts where no jury of peers is available. (See affidavits of District Attorney Bernard N. Marcantel, Exhibit No. 2; and Assistant Attorney General Teddy W. Airhart, Jr., Exhibit No. 3; and Special Counsel Thomas McFerrin, Exhibit No. 4, attached hereto and made a part of this supplemental application for rehearing.)

XII.

We further submit that the decision of this Court is in error because it is tantamount to declaring the federal system for the selection of jurors unconstitutional because the federal system and the State system for selecting jurors are similar particularly in respect to the fact that prospective jurors cannot be selected by either a state jury commission or the United States District Clerk on the basis of color. In any event the same criteria should apply to both if there is any violation of Collins' rights in this case.

XIII.

This Honorable Court erred in holding (See Page 18 of the Opinion) "To hold Collins to the ordinary rules of an adversary trial in failing to call Mr. Lock-

ridge as a witness seems to us, in effect, to prejudge Collins' mental capacity to stand trial."

The record shows that Mr. Lockridge was summoned as a witness on behalf of the defendant at the time of the hearing on the question of Collins' sanity. The record further discloses that Mr. Lockridge was sequestered with the other witnesses but he was never called upon to testify for the defendant. Louisiana law provides that if a witness is subpoenaed and then not called upon to testify, a legal presumption exists that the testimony of that witness would have been unfavorable to the party (defendant in this instance) summoning said witness. (See LRS 15:432 and cases cited in footnotes thereunder).

For this Court to now say that it is unfair to say that the Federal District Court should have heard his testimony, not at the request of the defendant, is tantamount to forcing the United States District Court to consider evidence that the defendant himself did not wish to use at his own trial.

If this case should be remanded to the Federal District Court with instructions to the court to call Mr. Lockridge as a witness, under the protest or at least without the consent of the defendant, it would doubtless be prejudicial to the defendant and would constitute not only a novel procedure, but an unknown procedure of the law. A defendant has the right not to call a single witness in his defense if he so chooses.

WHEREFORE, defendant-appellee respectfully prays that this Honorable Court grant a rehearing in

this matter, and that upon such rehearing the judgment of the United States District Court be affirmed.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General, State of Louisiana.

CARROLL BUCK,
First Assistant Attorney General.

HARRY FULLER,
Second Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

CERTIFICATE

I, Jack P. F. Gremillion, do hereby certify that a copy of the above and foregoing petition for rehearing has been deposited in the United States mail, this date, postage prepaid, addressed to Stephen P. Coco and Herschel N. Knight, attorneys for petitioner-appellant, Jennings, Louisiana.

Jack P. F. Gremillion

Baton Rouge, Louisiana, this 3rd day of January, 1964.

EXHIBIT No. 1

OFFICE, CLERK THIRTY-FIRST JUDICIAL DISTRICT COURT

STATE OF LOUISIANA,
PARISH OF JEFFERSON DAVIS.

BE IT KNOWN, that on this 7th day of September, A. D., 1960, in pursuance to an order of His Honor MINOS D. MILLER, JR., Judge of the Thirty-First Judicial District Court of Louisiana, holding session in and for the Parish of Jefferson Davis, State of Louisiana, and spread on the minutes of said Court on August 26th, A. D., 1960; We, JAMES E. ARCENEAUX, BERT LANDRY, T. R. STROHE and JOHNNY BENOIT, Jury Commissioners, duly qualified, appointed and sworn as such, having been duly summoned, according to law, together with CHARLES A. PITRE, Clerk of the Thirty-First Judicial District Court of the Parish of Jefferson Davis and Ex-Officio a Member of the Jury Commission, also duly appointed and sworn, did meet at the office of the Clerk of the Thirty-First Judicial District Court, in and for the Parish of Jefferson Davis, State of Louisiana, in the presence of Carrie Istre Blanchard and Fred Langley, competent witnesses, duly summoned for the purpose and possessing the qualifications prescribed by law, and proceeded to Select a Grand Jury, Draw a Petit Jury and Civil Petit Jury, to serve as follows, to-wit:

Twenty (20) names from the General Venire Box to serve as Grand Jurors at the term of Court begin-

ning Wednesday October 5th, 1960, at 10:00 o'clock A. M.

Forty (40) names of Men, good and True, residents of said Parish of Jefferson Davis and possessing the qualifications of Petit Jurors therein to serve as Petit Jurors for the balance of the week beginning Monday, November 7th, A.D., 1960 at 10:00 o'clock A. M.

Forty (40) Men, Good and True residents of the said Parish of Jefferson Davis and possessing the qualifications of Civil Petit Jurors therein to serve as Civil Petit Jurors for the week beginning Monday, October 17th, A. D., 1960 at 10:00 o'clock A. M.

And having been furnished by CHARLES A. PITRE, Clerk, aforesaid, with a list of the Jurors previously selected for service, in accordance with law, and having removed from Venire Box and having struck from the General Venire List, the names of those who are known to these commissioners to have left the State permanently, who have died, or have otherwise been disqualified since the last drawing. The names so removed therefrom being:

NONE NONE

WARD ONE

1. Norris Benoit	2. Herman Berkin
3. Dean Blackwell	4. Leroy Bonin
5. R. J. Bonin	6. Alcide Broussard
7. Robert Chapman	8. Aras Dupuis
9. Lovess Hebert	10. Lloyd Kratzer
11. Norman Lyons	12. Gordon Mack
13. Charles Lee Martin	14. Milton Mire

15. Hugh Marceaux
16. W. F. McDonald
17. Albert Schlessinger
18. H. J. Veronie
19. Wilbur Williams
20. Famon Bonin
21. Leo Carruth
22. Eddie Duhon
23. Ralph R. Oliver
24. Wilfred Guidry
25. Claude Armentor
26. Lloyd Boudreaux
27. Earl Duhon
28. Maynard Hartwell
29. Wilson F. Hebert
30. Francis Lyons
31. Jimmie Spence
32. Emile Richard
33. Wilfred A. Roy
34. James Robinson
35. Donald Chapman
36. Lynes Conner
37. Harry Breaux

WARD TWO

38. Herbert L. Boudreaux, Jr.
39. Lee Roy L. Breaux
40. Sidney Briscoe
41. Edgar L. Broussard
42. J. W. Dennis
43. James Evans
44. Clarence B. Goodreau
45. Hazard Guillot
46. Arthur Lee Handy
47. Curtis J. Hanks
48. T. R. Iglehart
49. Aubrey Ingalls
50. Herman Istre
51. Barney Keeton
52. Otis Legros
53. Wilfred A. Marks
54. Dudley Matte
55. R. P. Mouton
56. Charles Nelson
57. Murphy Richard
58. Ronald C. Shultz
59. Remy Sonnier
60. Preston Stagg, Jr.
61. Louis T. Swearingen
62. Francis Theall, Jr.
63. Bernan H. Theunissen
64. Hanson Thibodeaux
65. Glenn Tomlinson
66. Ernest Taylor
67. Alvin Victorian

68. Allison Walker
69. Daley Williams
70. Curtis Welch
71. Leroy Hilbun
72. Douglas J. Miller
73. Jesse L. Pipkin
74. Frank West, Jr.
75. Franks S. Anephol
76. Curtis Austin
77. Marvin Benoit
78. Ray J. Bertrand
79. Louis J. Boudreaux, Jr.
80. James Capdeville
81. George A. Cart
82. Ellis Cormier
83. Ernest A. Houssiere
84. Steven B. Lejeune
85. Willis W. Robinson
86. Hanson Thibodeaux
87. T. D. Williams
88. Melbourne Ardoin
89. J. W. Billodeaux
90. U. J. Daigle
91. Fred Dommert
92. James L. Green, Jr.
93. Vincent Haydel, Jr.
94. Richard B. Hill
95. Terry A. Istre

WARD THREE

96. Alle Clement
97. Fred Compton
98. Maurice Courville
99. Claude Crochet
100. Charles M. Davis
101. Gustin Doise
102. E. C. Folkland
103. Duffy E. Gibbs
104. James A. Hill
105. Henry Jester
106. Austin Miller
107. Wayne Doise
108. William Hetzel, Jr.

WARD FOUR

109. Charles O. Daggett
110. Claude Anderson
111. Eldridge Buller
112. Arden J. Clement
113. Lloyd J. Darbonne
114. Lampkin Dupuis
115. Fabe Finch
116. Shirley Lafosse
117. Murray Langley
118. Wilton A. Leblanc
119. Heard Lejeune
120. Abraham Manuel

121. Roy Anderson
122. Steven Sonnier
123. Harley Bruchhaus
124. Joe Waggoner
125. William P. Fulton
126. Bludie John Langley
127. Octave Manuel
128. Hillary M. Marcantel

WARD FIVE

129. Henry Phenice
130. Cyrus Sonnier
131. Kermit Hinchee
132. Wilbur Patterson
133. Carl Hoppe
134. Miron Fenton
135. Brennon Meaux
136. Courtland Fisher
137. Frank Janssen
137. Elliot Burnham
139. P. H. Habetz
140. E. A. Stegall
141. Larry Hientz
142. Wyatt D. Sharp

WARD SIX

143. Aldest Hebert
144. Wilbur McCown
145. Edgar Hoke
146. Ralph Hayes
147. Robert Lyons
148. Clyde Nugent
149. Irwin Carter
150. O. J. Benoit
151. John Lyons
152. L. J. Doan
153. Lester Joseph
154. Sam Rubin
155. Joe Naebors
156. Gerard Romero
157. Cassius Clay
158. Loree Ardoin
159. Bill Monks, Jr.
160. Ray Folkland
161. Charles Atteberry
162. Saul Klaus
163. Thomas B. Jones
164. Rivers Daigle
165. W. E. Alexander
166. Leslie C. Daigle
167. Paul A. Granger
168. Lasson Legros
169. Vurney Dupont
170. Mathew J. Meyers
171. Neale F. Minnix
172. M. J. Pitre
173. Donald L. Robinson
174. F. A. Troutman
175. Murphy Bertrand

WARD SEVEN

176. Adam Mallett
177. Tony Kratzer
178. Vernice Marceaux
179. Eugene Todd
180. Watson Beard
181. J. E. McCown, Jr.
182. Durphy Bertrand
183. Milton Vanicor
184. Philip Zaunbrecher

WARD EIGHT

185. J. D. Pousson
186. Asa Comeaux
187. Le Roy Thompson
188. John Marcantel
189. Joseph A. Opferkuch
190. Paul McCormick
191. George Koonce
192. Frank David
193. Manuel Dugar
194. Leo Begnaud
195. Dallas W. Peloquin
196. Chester L. David
197. Gwinn Bowers

WARD NINE

198. Bert Corbello
199. Lee Bebee
200. Willard Ball

And we did immediately proceed to supplement the General Venire List with the names of good men and true, eligible and competent to serve as Jurors, which said supplemental list was then and there written out by CHARLES A. PITRE, Clerk of Court and Ex-Officio a Jury Commissioner, under the supervision of the other Jury Commissioners and witnesses, aforesaid, and each name on said supplemental list, together with the names of the ward in which each resides was written out on Blank Slips of paper of uniform size, weight and texture and deposited in the General Venire Box, which, together with the remaining names of the GENERAL VENIRE LIST,

as also a corresponding number in the GENERAL VENIRE BOX to complete the General Venire List of Three Hundred Names, as required by law, all of the names of the said supplemental list being residents of the Parish of Jefferson Davis, and State of Louisiana, to-wit:

No.	Name	Ward	No.	Name	Ward
201.	Norman Chaney	1	202.	Aubrey Wade	1
203.	A. R. Womack	1	204.	Floyd Young	1
205.	Austin Abshire	1	206.	William Andrus	1
207.	Gabriel Bailly Jr.	1	208.	Clarence Bertrand	1
209.	Ira Bertrand	1	210.	Arceneaux Boudoin	1
211.	Clayven Broussard	1	212.	Jimmie Broussard (Duke)	1
213.	Roland L. Broussard	1	214.	Paul Champagne	1
215.	Herbert Chapman	1	216.	Percy Comeaux	1
217.	Wilbert J. Courts	1	218.	Harold James Broussard	2
219.	Charles H. Burgess Jr	2	220.	F. A. Frere Jr	2
221.	John B. Guidry	2	222.	James Ward Jr	2
223.	Mel Linde	2	224.	Chester Guidry	2
225.	Peter Davis	2	226.	Maurice Caraway	2
227.	Allen W. Seagraves	2	228.	John Marshall Miller	2
229.	Richard Roe Jr	2	230.	Leo J. Bordelon	2

No.	Name	Ward	No.	Name	Ward
231.	William Cagnon, Jr.	2	232.	Warren P. Comeaux	2
233.	Albert J. Howard	2	234.	Murphy Maier	2
235.	David H. Wilson	2	236.	Fred A. Stolzie	2
237.	Robert F. Prather	2	238.	Charles E. Liles	2
239.	Clyde J. Knight	2	240.	Alton P. Leblanc	3
241.	Morris Ranget	3	242.	Arthur Ledoux	3
243.	Paul Smith	3	244.	Albert Richard	3
245.	Frank Lopez	3	246.	Lloyd Bryan	3
247.	Willie Basile	4	248.	Maxile Bertrand	4
249.	Ezra Bolles	4	250.	Elzie Bertrand	4
251.	Alvin L. Buller	4	252.	Joseph Leward Cart	4
253.	Isaac Marcantel	4	254.	Ora Marcantel	4
255.	Ralph L. Odom	4	256.	Richard Daggett	4
257.	Joseph C. Granger	5	258.	Edwin Reed	5
259.	John Terry Richard	5	260.	George J. Theriot Jr.	5
261.	Joseph A. Young, Jr.	5	262.	Dewey Vidrine	5
263.	Luther Stubblefield	6	264.	Lane Abbott	6
265.	Allen Keys	6	266.	Sidney Lee Dupuy	6
267.	Edward Ardoin	6	268.	Glenn Brown	6
269.	Ralph Bucklin	6	270.	Emory Bihm	6
271.	Francis Conner	6	272.	Arthur W. Crowl Jr.	6
273.	Wilson J. Derouen	6	274.	R. E. "Buddy" Estes	6

No.	Name	Ward	No.	Name	Ward
275.	James A. Guillory	6	276.	Eddie Benoit	7
277.	Lyon K. Arceneaux	7	278.	Leroy Guillory	7
279.	Milton Bertrand	7	280.	Perrin Arceneaux	7
281.	Drew Ellender	7	282.	Darrell Gillett	7
283.	Clyde Coble	7	284.	James Kratzer	7
285.	Charles R. Benoit	7	286.	C. J. Tiller	7
287.	Adam Hardy	8	288.	Clarence Vital	8
289.	Elmer Foreman	8	290.	Harry J. Fontenot	8
291.	Carl D. Corbello	8	292.	George Cary	8
293.	Thomas Broussard	8	294.	Norris Charles	9
295.	James A. Kingrey Jr.	9	296.	Warren Bebee	9
297.	John C. Reed	9	298.	Richard McNabb	9
299.	Wilton M. Buller	9	300.	Charley Buller	9

PURSUANT to an Order of the HONORABLE MINOS D. MILLER, JR., Judge of the Thirty-First Judicial District Court of Louisiana, dated August 26th, A. D., 1960, holding session in and for the Parish of Jefferson Davis, State of Louisiana, the Jury Commission, in the presence of the aforesaid witnesses, then and there proceeded to select the names of Twenty (20) men, good and true to serve as Grand Jurors

for the term beginning Wednesday October 5th, A. D., 1960, which selection is as follows, to-wit:

No.	Name	Ward	No.	Name	Ward
1.	Norman Chaney	1	2.	Aubrey Wade	1
3.	A. R. W mack	1	4.	Floyd Young	1
5.	James Ward Jr.	2	6.	John S. Guidry	2
7.	F. A. Frere Jr.	2	8.	Charles H. Burgess Jr.	2
9.	Harold James Broussard	2	10.	Alton P. Leblanc	3
11.	Willie Basile	4	12.	Maxile Bertrand	4
13.	Ezra Bolles	4	14.	Joseph C. Granger	5
15.	Allen Keys	6	16.	Luther Stubblefield	6
17.	Lane Abbott	6	18.	Eddie Benoit	7
19.	Adam Hardy	8	20.	Norris Charles	9

Whereupon the foregoing Twenty (20) names were then and there written out on slips of white paper of uniform size, weight and texture, in the presence of the Jury Commissioners and witnesses and were placed in a Blank Envelope which was immediately sealed and endorsed "LIST OF GRAND JURORS." Said Envelope containing the said Twenty (20) names was placed in a tin box designated, "Grand Jury Box," and sealed.

And then Johnny Benoit, one of the Jury Commissioners, in the presence of the other Jury Commissioners and the aforesaid witnesses, then immediately proceeded to draw, one at a time, from the GENERAL VENIRE BOX, after having thoroughly

mixed the names therein, the names of Forty (40) men, good and true, to be summoned to appear and answer in Open Court at the Court House of Jefferson Davis Parish, Louisiana at 10:00 o'clock A. M., on Monady November 7th, A. D., 1960, and to serve as Petit Jurors for the balance of said week, which drawing is as follows, to-wit:

No.	Name	Ward	No.	Name	Ward
1.	Earl Duhon	1	2.	Austin Abshire	1
3.	Ralph R. Oliver	1	4.	Joe Naebers	6
5.	William Hetzel Jr.	3	6.	Edward Ardoin	6
7.	Glenn Brown	6	8.	Dred Ellender	7
9.	Elmer Foreman	8	10.	Lamkin Dupuis	4
11.	Peter Davis	2	12.	Harry J. Fontenot	8
13.	William Andrus	1	14.	Terry A. Istre	2
15.	Warren P. Comeaux	2	16.	William Cagnon Jr.	2
17.	Cassius Clay	6	18.	Allen W. Seagraves	2
19.	Warren Bebee	9	20.	Milton Bertrand	7
21.	Wilton A. Leblanc	4	22.	Thomas B. Jones	6
23.	Claude Anderson	4	24.	Rivers Daigle	6
25.	Charles O. Daggett	4	26.	Neale F. Minnix	6
27.	Watson Beard	7	28.	James Kratzer	7
29.	Adam Mallett	7	30.	Heard Lejeune	4
31.	Ray Folkland	6	32.	Dewey Vidrine	5
33.	Albert Richard	3	34.	Ora Marcantel	4
35.	Isaac Marcantel	4	36.	Herman Istre	2
37.	Dean Blackwell	1	38.	Wilton M. Buller	9
39.	Gerard Romero	6	40.	Frank Lopez	3

We, the Jury Commissioners, do hereby certify that the foregoing list of Forty (40) names is a true and correct copy and proces verbal of the drawing of a Petit Jury to serve for the said week and the same is approved and endorsed, "List of Petit Jurors." The foregoing Forty (40) names were placed in a plain white envelope and sealed. The envelope was then placed in a tin box designated, "Petit Jury Box," and sealed.

And then Johnny Benoit, one of the Jury Commissioners in the presence of the other Jury Commissioners and the aforesaid witnesses, then immediately proceeded to draw one at a time, from the GENERAL VENIRE BOX, after having thoroughly mixed the names therein, the names of Forty (40) men, good and true, residents of the said Parish and possessing the qualifications of Civil Petit Jurors therein, to serve as Civil Petit Jurors for the week beginning Monday October 17th, A. D., 1960 at 10:00 o'clock A. M., and which drawing is as follows, to-wit:

No.	Name	Ward	No.	Name	Ward
1.	Bludie John Langley	4	2.	Charles Nelson	2
3.	Percy Comeaux	1	4.	Herbert Chapman	1
5.	Ellis Cormier	2	6.	R. P. Mouton	2
7.	Leroy Bonin	1	8.	Clyde J. Knight	2
9.	William P. Fulton	4	10.	Stephen Sonnier	1

No.	Name	Ward	No.	Name	Ward
11.	Frank West, Jr.	2	12.	Robert F. Prather	2
13.	Charles R. Benoit	7	14.	C. J. Benoit	6
15.	Richard McNabb	9	16.	Glenn Thomlinson	2
17.	Famon Bonin	1	18.	Charles E. Liles	2
19.	Richard B. Hill	2	20.	Preston Stagg, Jr.	2
21.	Thomas Broussard	8	22.	George Cary	8
23.	Leslie C. Daigle	6	24.	Vincent Haydel, Jr.	2
25.	Lloyd Bryan	3	26.	Ralph L. Odom	4
27.	Norris Ranget	3	28.	Paul Smith	3
29.	Duffey E. Gibbs	3	30.	Robert Lyons	6
31.	Richard Roe Jr.	2	32.	Ernest A. Houssiere	2
33.	Arthur Lee Handy	2	34.	Abraham Manuel	4
35.	John C. Reed	9	36.	Manuel Dugar	8
37.	Ira Bertrand	1	38.	Wilfred A. Roy	1
39.	Cyrus Sonnier	5	40.	Perrin Arceneaux	7

WHEREUPON, the foregoing Forty (40) names were placed in a Plain White Envelope, which was sealed and marked, "LIST OF CIVIL PETIT JURORS." Said Envelope was then placed in a tin box designated, "CIVIL PETIT JURORS," and sealed.

Having completed the drawing of Jurors under

the Judicial Order dated August 26th, A. D., 1960, and having placed the envelopes containing the names of the Jurors selected and drawn herein, in the various tin boxes designated as "GRAND JURY BOX," "PETIT JURY BOX," and "CIVIL JETIT JURY BOX," and having locked and sealed them and also having locked and sealed the tin box known and designated as the "GENERAL VENIRE BOX," and having delivered them into the hands of CHARLES A. PITRE, Clerk of the District Court and Ex-Officio a Jury Commissioner to be safely kept, subject to the orders of the District Judge and not to be opened, except according to law.

We, the Jury Commissioners, aforesaid, do hereby certify, that the avobe and foregoing is a True and correct list and proces verbal, in detail, of the Selection of a Grand Jury, the drawing of a Petit Jury and Civil Petit Jury, made by us on September 7th, A. D., 1960 and the said drawing was made in all matters and things in strict compliance with law, and the same is now approved in all its parts.

WE HEREBY CLOSE this proces verbal of the Jury Drawing on this 7th day of September, A. D., 1960.

WITNESSES:
s/ Fred Langley
s/ Mrs. Carrie Blanchard

s T. R. Strohe
s/ Bert Landry
s/ Johnny Benoit
s/ James E. Arceneaux
Jury Commissioners

s Charles A. Pitre—Clerk of Court & Ex-Officio a Member of the Jury Commission.

"A TRUE COPY OF PROCES VERBAL OF JURY DRAWING HELD SEPTEMBER 7TH, A. D., 1960.

s/ J. W. PITRE
Clerk of Court.
(SEAL)

* * * * * * * * * * * *

NOTE: The little check marks opposite the names were made by the attorneys for the defendant appellee, for the convenience of the Court, to show that the twenty (20) names forming the Grand Jury panel were taken from the venire list of three hundred (300).

EXHIBIT No. 2

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON DAVIS

BEFORE ME, J. W. PITRE, the undersigned authority, personally came and appeared:

BERNARD N. MARCANTEL

who, being first duly sworn, did depose and say as follows:

1. That he is the duly elected qualified and acting District Attorney of the 31st Judicial District Court in and for the Parish of Jefferson Davis, State of Louisiana;

2. That he was present and of counsel in Open Court on December 7, 1962 in habeas corpus proceedings entitled *Woodman J. Collins v. Victor G. Walker, Warden, Louisiana State Penitentiary*, No. 664 Misc., Eastern District of Louisiana, United States District Court, now No. 20,537 Fifth Circuit Court of Appeals, New Orleans, Louisiana;

3. That at the habeas corpus hearing held in United States District Court of the Eastern District of Louisiana, Baton Rouge Division, the realtor, Woodman J. Collins, was represented by counsel, Herschel N. Knight and Stephen P. Coco, who presented oral arguments on the record as madeup in the 31st Judicial District Court (trial court); the Honorable E. Gordon West, District Judge, ordered that the entire record

in state court be filed in evidence in the District Court for his review; It was agreed by all counsel that this would make up the record; relator did not offer or tender *any new* evidence on any point raised in his petition for a Writ of Habeas Corpus; he was content to rest his petition for habeas corpus on the state court record alone.

s BERNARD N. MARCANTEL

Sworn to and Subscribed, before me, Notary Public, on this 31st day of December, 1963.

s J. W. PITRE
Clerk of Court & Ex-Officio
a Notary Public
(SEAL)

EXHIBIT No. 3

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, ESTHER A. KELLY, the undersigned authority, personally came and appeared:

——TEDDY W. AIRHART, JR.——

who, being first duly sworn, did depose and say as follows:

1. That he is a duly appointed Assistant Attorney General, presently serving as such in the Attorney General's Office, State of Louisiana.

2. That he was present and of counsel in Open Court on December 7, 1962 in habeas corpus proceedings entitled *Woodman J. Collins v. Victor G. Walker, Warden, Louisiana State Penitentiary,* No. 664 Misc., Eastern District of Louisiana, United States District Court, now No. 20,357 Fifth Circuit Court of Appeals, New Orleans, Louisiana;

3. That at the habeas corpus hearing held in United States District Court of the Eastern District of Louisiana, Baton Rouge Division, the relator, Woodman J. Collins, was represented by counsel, Herschel N. Knight and Stephen P. Coco, who presented oral arguments on the record as madeup in the 31st Judicial District Court (trial court); the Honorable E. Gordon West, District Judge, ordered that the entire record in state court be filed in evidence in the District Court for his review; it was agreed by all coun-

sel that this would make up the record; relator did not offer or tender *any new* evidence on any point raised in his petition for a Writ of Habeas Corpus; he was content to rest his petition for habeas corpus on the state court record alone.

s/ TEDDY W. AIRHART, JR.

Sworn to and subscribed before me, Notary Public, on this 2nd day of January, 1964.

s/ ESTHER A. KELLY
Notary Public
(SEAL)

EXHIBIT No. 4

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, ESTHER A. KELLY, the undersigned authority, personally came and appeared:

——THOMAS W. McFERRIN——

who, being first duly sworn, did depose and say as follows:

1. That he is a duly appointed Special Counsel, presently serving as such in the Attorney General's Office, State of Louisiana.

2. That he was present and of counsel in Open Court on December 7, 1962 in habeas corpus proceedings entitled *Woodman J. Collins v. Victor G. Walker, Warden, Louisiana State Penitentiary*, No. 664 Misc., Eastern District of Louisiana, United States District Court, now No. 20,537 Fifth Circuit Court of Appeals, New Orleans, Louisiana:

3. That at the habeas corpus hearing held in United States District Court of the Eastern District of Louisiana, Baton Rouge Division, the relator, Woodman J. Collins, was represented by counsel, Herschel N. Knight and Stephen P. Coco, who presented oral arguments on the record as madeup in the 31st Judicial District Court (trial court); the Honorable E. Gordon West, District Judge, ordered that the entire record in state court be filed in evidence in the District Court for his review; It was agreed by all counsel that this would make up the record; relator did not offer or

tender *any new* evidence on any point raised in his petition for a Writ of Habeas Corpus; he was content to rest his petition for habeas corpus on the state court record alone.

s/ THOMAS W. McFERRIN

Sworn to and subscribed before me, Notary Public, on this 2nd day of January, 1964.

s/ ESTHER A. KELLY
Notary Public
(SEAL)

APPENDIX NO. III-B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 11, 1964.)

ON PETITION FOR REHEARING

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

RIVES, Circuit Judge: The opinions on original hearing are withdrawn, and the following opinion substituted:

Collins, a Negro, was convicted and sentenced to death under an indictment charging him with aggravated rape upon a white woman. The conviction

and death sentence were affirmed by the Supreme Court of Louisiana. *State v. Collins*, 1962, 138 So.2d 547. Certiorari to the Supreme Court of the United States was denied, 371 U.S. 843.

His petition for habeas corpus to the United States District Court claimed that his conviction was violative of the Constitution of the United States in three respects: (1) He was discriminated against because of his race or color in the organization of the grand jury which indicted him; (2) he was mentally unable to stand trial, an imbecile not able to assist counsel in his defense; (3) his conviction was procured in part by an unconstitutionally coerced confession.

Each of these contentions had been raised and decided against him upon his trial and upon appeal to the State Supreme Court. It is therefore properly conceded that he has satisfied the requirement of 28 U.S.C.A. § 2254, that state remedies be exhausted before a federal court may grant an application for habeas corpus. 28 U.S.C.A. § 2254; *Brown v. Allen*, 1953, 344 U.S. 443, 447-450; *Fay v. Noia*, 1963, 372 U.S. 391, 426, et seq.

At the request of the district court, a copy of the record and transcript of proceedings in the State courts was presented and filed with the district court. Upon the basis of that record and transcript, and without taking additional evidence, the district court denied the application for habeas corpus. *Collins v. Walker*, E.D. La. 1963, 215 F.Supp. 805. Thereafter, the district judge issued a certificate of probable cause in accordance with 28 U.S.C.A. § 2253, and permitted the

prosecution of this appeal in forma pauperis.

It is settled that a federal district court may, in its discretion, refuse the writ of habeas corpus without hearing additional evidence, if the court is satisfied, by an examination of the record and proceedings in the State court, that the issues have been adequately litigated, that the state process has given fair consideration to the issues and the evidence, and has resulted in a legally satisfactory conclusion, and that no unusual circumstances calling for a hearing are presented. *Brown v. Allen, supra*, 344 U.S. at 463. The Supreme Court has, however, recently emphasized that, "Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts." *Fay v. Noia, supra*, 372 U.S. at 422. The Supreme Court in *Townsend v. Sain*, 1963, 372 U.S. 293, 313, set forth the tests with more particularity:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact

did not afford the habeas applicant a full and fair fact hearing."

On the first question, that of racially discriminatory organization of the grand jury; we reach a conclusion upon the State court record and transcript opposite to that reached by the state courts and by the district court.

(1) Indictment is the only method provided by the law of Louisiana for the institution of the prosecution of a capital offense. La.Rev.St. Title 15, § 2. A jury commission for each parish is selected and appointed by the district judge. La.Rev.St. 15:175. At the time ordered by the district judge, the jury commission meets at the office of the clerk of the district court and selects from the persons qualified to serve as jurors for their parish three hundred persons as the "general venire list." La.Rev.St. 179. The next section provides the method of selecting a grand jury.

"§ 180. *Selection of grand jury*

"Immediately after completing the general venire list, the commission shall elect *therefrom* the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled.

"The names of the persons so selected shall be written on slips of paper, by the clerk, in the presence of the commissioners and they

> shall place the slips in an envelope, seal the same and indorse thereon the words: 'List of Grand Jurors.' " (Emphasis supplied.)

Negroes constitute a substantial proportion of the population of Jefferson Davis Parish. Mr. Arcenaux, the member of the Jury Commission from Ward 2, testified that the population in that ward was about 75% white and 25% Negro, that being the "heaviest concentration of colored people in Jefferson Davis Parish."

Mr. Arcenaux had served on the Jury Commission since 1958. In that year the Jury Commission prepared the original "general venire list" of 300 persons.

> "Q. Would you tell the court what sort of instructions you were given and who gave them to you?
>
> "A. When we were appointed on the Committee we were given instructions as to who was eligible and ineligible for jury duty by written instructions from the Judge. We have been from time to time reminded by the Judge that in picking the jury to just be careful that there should be both white and colored members on the jury. Other than this I would say we've had no instructions."

Some Negroes were included in this original list of 300 but Mr. Arceneaux did not recall how many. "We have met twice annually for the choosing of additional names to add to the list (sic) to replace the juries that have been drawn out of that original list."

Mr. Arceneaux further testified:

"Q. Now, have there been three grand and petit juries drawn from this list since it was prepared?

"A. From that list, no.

"Q. How many have been drawn or do you know?

"A. I think there would have been five grand juries drawn since we've been on. It's either four or five.

"Q. Now, Mr. Arceneaux—

"A. They are not taken from that list of three hundred.

"Q. Sir?

"A. That grand jury was not picked out of that original group of three hundred.

"Q. It was not?

"A. No.

"Q. How was that—

"A. The grand jury is picked by names in the additions to the three hundred.

"Q. In additions to the three hundred?

"A. Correct."

Again Mr. Arceneaux testified:

"Q. Do you have any idea how many colored people are presently in the venire list of three hundred?

"A. That would be a hard question to answer.

I don't know I could even give an estimate because we have drawn a lot of the original names and it would be hard —well, it would be impossible for any individual member of the Commission to say, because the names when they are submitted are not submitted as colored or white, they're submitted as names and we know in our selection what they are but when they are put in the box there is no way in distinguishing between them.

"Q. But when you do draw the grand jury out you do know whether they are colored or white?

"A. The grand jury is named before the names are put in the box, yes, we do know whether they are colored or white.

"Q. Now, as I understand it, when you prepare the grand jury you don't look in the box of three hundred and select out twenty names? You simply get together and you all select twenty names, period, and put them on there. Is that right?

"A. That's correct."

As each grand jury was selected, the Jury Commission was instructed by Mr. Charles A. Pitre, the Clerk of the District Court, that some Negroes should be included. As Mr. Arceneaux testified:

"A. That instruction, each time that we had met, has come from Mr. Pitre that there should be some colored representation on each grand jury.

"Q. I see.

"A. But not any specific instructions other than that we should attempt to do that each time."

At the time of Collins arrest on April 8, 1960, there had been recently empaneled for Jefferson Davis Parish a regular grand jury for the six months commencing March 21, 1960. There was no Negro on that grand jury for the reason thus stated by Mr. Arceneaux:

"Q. Now do you know what reason why you did not put any on the grand jury immediately prior to the grand jury under which this man was indicted?

"A. I had put some on the previous and I was depending on some one else to put someone on the previous grand jury and in the course of events when we finished putting the names in it turned out that all of us had depended on someone else putting the names in and it so happened none of us did."

Mr. Arceneaux further testified:

"Q. Now, Mr. Arceneaux, how many Negroes did you put on the grand jury panel or the twenty names prior to this particular one and prior to the one that you failed to put anyone on? About how many had you—

"A. I think that I had always put at least one on the grand jury panel on all of the grand juries that have been selected

except the one immediately preceeding (sic) the present grand jury."

Collins' case was not presented to the grand jury empaneled when he was arrested, but instead he was held in jail for six months until October 5, 1960, at which time six Negroes were purposely placed on the list of twenty names,[1] from which the judge selected the foreman, and the sheriff drew by lot the names of the other eleven jurors,[2] with the result that the

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[1] Mr. Strohe, the member of the Jury Commission from Wards 6 and 7, testified that there were very few Negroes in Ward 7, but about 30% of the population of Ward 6 was colored. He further testified:

"Q. . . . Now, do you recall how many Negroes were put on the grand jury venire of twenty names which is the present grand jury?

"A. Actually of the five of us we have our Wards designated and we feel responsible for those particular Wards, and to say exactly how many was put on I wouldn't know but I can speak for myself for 6 and 7.

"Q. Well how many were put on from 6 and 7?

"A. I think one from 6 and none from 7. . . ." Mr. Johnnie Robert Benoit, the Jury Commission member representing Wards 5, 8 and 9, testified that on the list of 20 names from which the court drew the grand jury which indicted Collins.

"Q. And how many did you put on?

"A. I put two white-man (sic) and one negro which I figured was fair to this man."

[2] Louisiana Revised Statutes Title 15, Sec. 184, provides in part that:

"The judge shall select from the list of grand jurors a suitable person to act as foreman of the grand jury, and the sheriff, under the direction of the court, shall draw by lot from the envelope indorsed 'list of grand jurors,' the names therein until eleven answer, who, with said foreman, shall constitute the grand jury."

The "list of grand jurors" referred to is the list of twenty names selected as provided in La.Rev.St. 15:180, heretofore quoted.

grand jury was composed of five Negroes and seven whites.

It was this grand jury which indicted Collins for aggravated rape and also for aggravated kidnapping and attempted murder. No other case was presented to this grand jury.

Appellee denies that the list of twenty was not selected from the general venire list of 300 persons, but was selected from persons not theretofore on the general venire list. Appellee concedes that Mr. Arceneaux so testified, but attaches as an exhibit to his brief on petition for rehearing a copy of a document not otherwise in this record, known as the *proces verbal* of the proceedings of the jury commission, to show that Mr. Arceneaux was in error. That *proces verbal* contains statements that the twenty names were removed from the general venire box.

Of course, in considering whether the Constitution has been violated, no conclusive presumption of truth is to be accorded the recitals of the *proces verbal* or of any other record, but the true facts may be developed. See *Massey v. Moore*, 1954, 348 U.S. 105, reversing *Massey v. Moore*, 5 Cir. 1953, 205 F.2d 665, note especially pages 671, et seq. The testimony of Mr. Arceneaux heretofore quoted is not disputed by any evidence introduced in this case, but is consistent with, if not supported by, the testimony of several other jury commissioners.[3]

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[3] See testimony of T. R. Strohe, R. pp. 133, 134, 135; Wendell Aguillard, R. p. 143; Bert Landry, R. pp. 147, 148; and Johnnie Robert Benoit, R. pp. 152, 153, 154.

If the *proces verbal* tended strongly to prove that Mr. Arceneaux was mistaken in his testimony on this point, and if such mistake would affect our decision, then perhaps this case should be remanded to the district court for a further hearing. However, even if the list of twenty had been selected from the general venire list, it would nonetheless remain true that six Negroes were purposely included in that list of twenty because of the fact that they were Negroes; that the identities of the six Negroes so included were known to the jury commissioners; that they knew also that the grand jury to be chosen from that list of twenty was to consider whether to return an indictment against Collins, and that no other case was scheduled to be considered by that grand jury.

A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. In the historic language of the elder Mr. Justice Harlan:

> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Plessy v. Ferguson, 1896, 163 U.S. 537, 559.

An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an

accused is entitled to demand under the Constitution is that in organizing the grand jury there shall be no discrimination against him because of his race or color. *Martin v. Texas*, 1906, 200 U.S. 316, 321.

The Supreme Court has frowned on the use of white tickets to indicate prospective white jurors and yellow tickets to indicate Negroes.

> "Petitioner's charge of discrimination in the jury selection in this case springs from the Jury Commissioners' use of white and yellow tickets. Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate."

Avery v. Georgia, 1953, 345 U.S. 559, 562.

The positive, affirmative duty resting upon jury commissioners and other public officials is expressed in *Avery v. Georgia, supra*, 345 U.S. 559, 561 as follows:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill v. Texas*, 316 U.S. 400 (1942)."

Also quoted in *United States ex rel. Seals v. Wiman, supra*, 304 F.2d at 66.

The only list of importance to the decision of this case is the list of twenty from which the foreman was selected and the other eleven grand jurors drawn. Six Negroes were deliberately included in this list of twenty because of their race. When to this circum-

stance is added the additional facts then known to the jury commissioners that the grand jury to be chosen from that list of twenty was to consider whether to return an indictment against Collins, and that no other case was scheduled to be considered by that grand jury, the conclusion becomes inescapable that in the organization of the grand jury which indicted Collins there was discrimination against him because of his race or color.

Since the judgment of the district court must be reversed and the cause remanded to await a possible reindictment and retrial of Collins, it is not necessary to decide the other two questions presented by this appeal.

Notwithstanding our holding that the indictment against Collins is unconstitutional and void, Collins is now legally detained upon his commitment to await the action of another grand jury. Collins is, of course, entitled to be tried within a reasonable time, and the district court should retain jurisdiction to meet the unlikely event that further orders and judgments may be necessary or proper.

Any such reindictment must of course be by a grand jury in the organization of which there has been no discrimination against Collins because of his race or color. For the guidance of the parties, the Court expresses the present opinion that if Collins is reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition

but in the regular course by the Courts of the State of Louisiana, subject to possible review by the Supreme Court of the United States or upon other habeas corpus proceedings.

The judgment of the district court is reversed, judgment here rendered in accordance with the holdings of this opinion, and the cause remanded for any further proceedings which may be found necessary or proper.

With this opinion thus substituted, the appellee's petition for rehearing is denied.

REVERSED, RENDERED, and REMANDED.

APPENDIX No. IV-A

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

SECOND AMENDED AND SUPPLEMENTAL BRIEF FOR REHEARING

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Courthouse,
Jennings, Louisiana.

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant.

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

SECOND AMENDED AND SUPPLEMENTAL BRIEF FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The defendant-appellee herein, the warden of the Louisiana State Penitentiary, presents this supplemental and amended brief in support of the rehearing which the Court has granted in the above and entitled numbered cause, and in support thereof, respectfully shows:

I.

The Opinion handed down March 11, 1964 contains substantial errors which we will point out herein and which can only be corrected by the Court allowing Arguments and/or remanding this Case to the Federal District Court for the purpose of taking additional evidence.

II.

The Decision belittles the qualifications of members of the Negro race to perform vital functions as citizens.

The holding is that Woodman J. Collins, a Negro, has been discriminated against by virtue of the fact that the jury commission purposefully included six Negroes in a list of 20 prospective grand jurors. The Court has concluded that since 30% of the men on the jury venire are Negroes that this fact in itself proves that a Negro charged with a capital offense and whose case will in all likelihood be presented to the Grand Jury is being discriminated against because of his race or color.

In reaching this conclusion this Court has done an injustice to the Negro race. The record is devoid of evidence to identify these six Negroes individually who were on the Jury venire. So far as this Court knows, these six Negroes may all have Masters Degrees from accredited colleges. So far as this Court knows these men may be the backbone of the National Association for the Advancement of Colored People and may be actively supporting its objectives and principles. So far as this Court knows these men are as highly respected and regarded in the community as any Caucasian in the Parish. So far as this Court knows these men may have served on criminal petit juries which have tried defendants of the Caucasian race for felonies. So far as this Court

knows these men may be substantial business people owning their own businesses.

In holding that Woodman J. Collins was *a fortiori* discriminated against because the Jury Commission purposefully made up a jury venire including 30% Negroes, this Court has held that it is impossible in Jefferson Davis Parish to find as many as six Negroes who would not discriminate against a member of their own race.

Should this Court have any desire to find out about the capacity of the six Negroes on the venire of twenty, we beg the Court to remand this case to the United States District Court for the taking of evidence as to the capacity and background of the entire Grand Jury venire. We submit that we can establish to the Court's satisfaction and beyond any questionable doubt that the six Negroes on the Grand Jury venire which was expected to hear evidence on the criminal charges pending against Woodman J. Collins were not only men of good character, unbiased and capable, but were men who could not conceivably be coerced, cajoled, forced or threatened into discriminating against Woodman J. Collins.

III.

This Decision strikes at the composition of all jury venires whether State or Federal. Its effect cannot be limited to a venire of 20.

The effect of this holding cannot be limited as

Your Honors suggest in the statement "The only list of importance to the decision of this case is the list of twenty from which the foreman was selected and the other eleven grand jurors drawn."

The rationale and reasoning of this opinion must be understood by the Bench and Bar of the United States to hold that whenever the Jury Commissioners purposefully include on their general venire list (from which all juries must be selected) 30% Negroes, then this will be held to be discriminatory against Negro defendants. This will be true regardless of the capacity, intelligence, education, or background of the Negroes.

The suggestion that the effect of this decision is limited to the selection of a jury venire of twenty will not stand. All jury commissioners must start with a list of a certain number of prospective jurors. If the list be 400, that cannot make it—for that reason alone—different from a list of 300. If the list be 300 that cannot in itself make it different from a list of 20. At some point the number of prospective jurors must be limited, and there must be a conscious selection of those to be placed on the general venire.

The theory of having jury commissioners to select jury lists is that jury commissioners are well acquainted with the general public, and by the exercise of the authority which they have for subpoenaing witnesses and obtaining information by questionnaires, they will make up a list of 20, or of 300, or of 400,

which list will not discriminate against anyone. In order to get competent jurors the Jury Commissioners are expected to know something of the competence of the propective jurors. To require that Jury Commissioners cannot learn whether or not prospective jurors are Negroes or Caucasians is impossible.

It must be well known that the Federal District Courts instruct Jury Commissioners (just as did the State trial judge) to place some Negroes on the jury venire.

If 30% Negroes on a venire list constitutes discrimination against the Negro, does 5% on the venire list also constitute discrimination against a Negro? (Cf. *Chance v. United States*, 322 Fed. 2d 201).

We submit that the Court could not find discrimination if the grand jury venire was composed of 20 (100%) Negroes, if in fact these men were qualified. And there is not the slightest suggestion in the entire record that any one of these six Negroes was incompetent, unqualified, or capable of discriminating against a Negro.

IV.

There is nothing in the record to support the Court's finding that "... no other case was scheduled to be considered by that Grand Jury." This is a completely unsupported statement lifted from Appellant's Brief.

On two occasions the opinion stated ". . . that no other case was scheduled to be considered by that

grand jury." Both statements (first at page 11 of the opinion and second at page 13) appear in that section of the opinion wherein the Court sets forth the basis for the conclusion that Woodman J. Collins was discriminated against because of his race or color.

There is not one shred of evidence in the record to substantiate this statement or conclusion. Indeed, when the Court considers the fact that a grand jury serves for six months, it would be literally impossible for the jury commission to know that no other cases would be scheduled for consideration by that grand jury.

Is it to be held that the Jury Commission discriminated simply because no other capital offense occurred during the six months that this jury was in existence? Surely the fact that no other case was presented to that grand jury cannot prove discrimination.

The grand jury which was empaneled in Jefferson Davis Parish March 20, 1961 considered three cases, all arising out of one incident and all affecting only one defendant. The grand jury which was empaneled in Jefferson Davis Parish on March 21, 1960 only considered one case against one defendant. One grand jury served in Jefferson Davis Parish for six months and did not consider any cases. The fact is that Jefferson Davis Parish is blessed in that it does not have a serious crime problem.

There is no way that the Jury Commission could have known that no other cases would be considered by that grand jury. There is no testimony or evidence to support that finding. It is, therefore, submitted that the Court will want to amend the opinion to omit therefrom any inference that the conclusion of discrimination was based in part on an unsupported finding of fact.

V.

Does the fact that the Members of a Jury Commission know that a capital case will be considered by the Grand Jury have any bearing on the question of discrimination?

At pages 11 and 13 of the opinion, it is pointed out that the Jury Commissioners knew ". . . that the grand jury to be chosen from that list of 20 was to consider whether to return an indictment against Collins, . . ." This is a true finding of fact. However, does this mean that the Jury Commission is discriminating simply by virtue of the fact that they know that there has been a capital offense committed and that it will have to be presented to the following grand jury?

The grand jury which had been empaneled just a few days prior to the alleged commission of the crimes by Woodman J. Collins did not have any Negroes on it. Numerous decisions by the United States Supreme Court have held that this single factor will create grave doubt as to the validity of any indictment returned by such a grand jury. *Pierre v. Loui-*

siana 306 US 354, 59 S. Ct. 536, L.ed. 757; *Eubanks v. Louisiana*, 356 US 584, 2L.ed. 2d. 991, 78 S. Ct. 970; *Patton v. Mississippi*, 332 US 463, 92 L.ed. 76, 68 S. Ct. 184, 1 ALR 2d. 1286; *Norris v. Alabama*, 294 US 587, 79 L.ed. 1074, 55 S. Ct. 579; *Reece v. Georgia*, 350 US 85, 100 L.ed. 77, 76 S. Ct. 167; *Hernandez v. Texas*, 347 US 475; 98 L.ed. 866, 74 S. Ct. 667. (Cf. *State v. Green*, 221 La. 713, 60 So. 2d. 208.) The district attorney is aware of these decisions. Any indictment by such a grand jury would certainly have been questioned as being discriminatory against a Negro, with some likelihood that any conviction would for that reason be reversed. It costs thousands of dollars to try a capital case. Jefferson Davis Parish, as all rural agricultural Parishes or Counties, has limited funds available to pay these costs. Can it be said that Collins has been prejudiced because a probable cause of reversal had to be cured before presenting the matter to the grand jury?

Had a special grand jury been empaneled then is would be expected that some court would hold that such a special grand jury was empaneled solely to consider the Collins case. Therefore, it would have served no purpose to have a special grand jury. Instead the Collins case was not presented until the next regular grand jury was empaneled in accordance with the regular business of the Parish.

To hold that discrimination is shown by virtue of the fact that the Jury Commission knew that the grand jury would consider the Collins case in tanta-

mount to holding that Woodman J. Collins could never be indicted for a capital offense if the grand jury which was serving at the time the alleged offenses were committed was subject to being quashed.

The effect of the Court's decree that ". . . Collins is now legally detained beyond his commitment to await the action of another grand jury," is to admit that knowledge by the Jury Commission that the Collins case may be presented to its next grand jury will not in itself result in discriminatory action.

VI.

Mr. Arceneaux did not testify that the 20 names selected for the Grand Jury Venire were in addition to the General Venire of 300.

Notwithstanding the fact that the Court expressly held that "Even if the list of 20 had been selected from the general venire list, . . ." this would not change the decision, the fact remains that from page 5 of the opinion through the first paragraph of page 11, the Court attempts to make out a case for a finding that the twenty names selected for the grand jury venire were in addition to the list of 300 names on the general venire.

In this connection, Your Honors will recall that no argument was ever made by anyone suggesting this interpretation of Mr. Arceneaux's testimony. If you would but ask attorneys for appellant they will readily affirm that you are in error. Surely you do not want to perpetuate an erroneous finding which has not been

suggested nor defended by any counsel in this case.

To understand Mr. Arceneaux's testimony, you should consider the requirements of the Louisiana law which were carefully followed by this Jury Commission. In 1958 these Jury Commissioners were appointed. The jury venire which had been made up by the previous Jury Commission was purged. Therefore, the new Jury Commission started with an entirely new list of 300 names. On the same day that this Jury Commission made up the list of 300 names, they were ordered to select 20 names from this venire to make up the grand jury venire. In accordance with the further orders of the trial court, they proceeded that same day to draw by lot from the remaining 280 names a list of 40 names to serve for the criminal petit jury term of Court. Then they proceeded to draw by lot from the remaining 240 names a list of 35 names for the civil petit jury term of Court.

Six months later the Jury Commission was ordered to meet and add to the remaining names on their original list which now contained only 205 names, so that the general venire list would have 300 names on it. Then in accordance with the trial court's order they proceeded to select 20 names for the grand jury venire. Then they drew by lot an additional 40 names for the criminal petit jury venire and they drew by lot an additional 35 names for the civil petit jury venire.

This procedure was carried out each of the five times that they met prior to the time that they drew

the venire which has been declared discriminatory by the Court's March 11th opinion.

With this brief summary of the Jury Commission's method of selecting jury venires, it is readily apparent that the testimony of Mr. Arceneaux to the effect that the grand jury venire of 20 names was selected from "the additions to the 300" means simply that the names selected for grand jury duty were not taken from the 1958 list. Instead the grand jury venire was taken from those names added to the 1958 list, which 1958 list had been depleted because of the removal of those names drawn or selected for the various juries drawn since 1958. The additions to the 1958 list had to be made so that each selection and drawing could be made in accordance with the law, from a list of 300 names.

At no point did Mr. Arceneaux or anyone else say that the list of 20 names selected for the grand jury was "in addition" to the list of 300 names which make up the general venire.

On page 10 of the opinion of March 11, 1964, the Court states "Appellee concedes that Mr. Arceneaux so testified, . . ." Our supplemental brief signed by us on January 3, 1964 is subject to this interpretation, for on page 4 of our brief at the outset of paragraph numbered "V." we stated--"If the grand jury had actually been selected according to Mr. Arceneaux's version, . . ." etc. It was not our intention to so concede and what we meant to say was—"If the Grand Jury venire had actually been selected according to

the Court's interpretation of Mr. Arceneaux's version, . . ." etc. The plain and obvious fact is that Mr. Arceneaux's testimony did not mean what the Court held that it meant. And we respectfully pray that the Court correct this error.

VII.

Woodman J. Collins was not indicted for aggravated kidnapping.

At page 10 of the March 11th opinion, it is stated that Collins was indicted for aggravated kidnapping. The only suggested source of this finding is in appellant's brief, for Collins was not indicted for aggravated kidnapping.

LSA-R.S. 14:44 defines the crime of aggravated kidnapping. One of the elements is that the offender must have intended "to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control: . . ." This element of the crime of aggravated kidnapping was missing.

VIII.

We respectfully urge this Court to point out how and in what manner Collins' civil rights under the Federal Constitution were denied. No reference to a particular section of the United States Constitution which supports the Court's position was cited in its opinion.

WHEREFORE, defendant respectfully prays that this Honorable Court recall and reverse its opinion of March 11, 1964, and affirm the judgment of the District Court. And further, that the defendant be permitted orally to argue this application for rehearing. In the alternative, that the Court remand this cause to the District Court for taking of such additional evidence as this Court believes should be developed.

Respectfully submitted,

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CERTIFICATE

I, Jack P. F. Gremillion, do hereby certify that a copy of the above and foregoing Second Amended and Supplemental Brief on Rehearing has been deposited in the United States mail, this date, postage prepaid, addressed to Stephen P. Coco and Herschel N. Knight, attorneys for petitioner-appellant, Jennings, Louisiana.

JACK P. F. GREMILLION

Baton Rouge, Louisiana, this_____day of April, 1964.

APPENDIX No. IV-B

ORDER DENYING SECOND REHEARING.

Extract from the Minutes of July 21, 1964

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

It is ordered by the Court that the second petition for rehearing filed in this cause be, and the same is hereby denied.

JONES, Circuit Judge, concurs specially.

DAWKINS, JR., District Judge, dissents.

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APPENDIX No. IV-C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 21, 1964.)

ON SECOND PETITION FOR REHEARING

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

RIVES, Circuit Judge: Additional briefs have been submitted on this second petition for rehearing, and the Court has heard further oral argument. At the outset, appellee objects that our opinion, reported at 329 F.2d 100, contains substantial errors of fact. In particular, appellee urges the following:

(1) "There is nothing in the record to support the Court's finding that '. . . no other case was scheduled to be considered by that Grand Jury.' " The burden of appellee's criticism is contained in the following sentence of his brief: "Indeed, when the Court considers the fact that a grand jury serves for six months, it would be literally impossible for the jury commission to know that no other cases would be scheduled for consideration by that grand jury." That is quite true. Our statement was in the past tense; "*was* scheduled" not "*would be* scheduled," and was plainly limited to the crucial time when the jury commission chose the list of names of twenty citizens from which the foreman was selected and the other eleven grand jurors were drawn. That statement was accurate and we adhere to it.

(2) Appellee urges that: "Mr. Arceneaux did not testify that the 20 names selected for the Grand Jury Venire were in addition to the General Venire of 300." In the opinion we quoted at length from the testimony of Mr. Arceneaux, including the following:

"A. That grand jury was not picked out of that original group of three hundred.

"Q. It was not?

"A. No.

"Q. How was that—

"A. The grand jury is picked by names in the additions to the three hundred.

"Q. In additions to the three hundred?

"A. Correct."

"Q. Now, as I understand it, when you prepare the grand jury you don't look in the box of three hundred and select out twenty names? You simply get together and you all select twenty names, period, and put them on there. Is that right?

"A. That's correct." 329 F.2d at 102. 103.

Appellee insists that "instead the grand jury venire was taken from those names added to the 1958 list, which 1958 list had been depleted because of the removal of those names drawn or selected for the various juries drawn since 1958." While we think that our statement was accurate, we will accept the appellee's version. The difference is immaterial for the reasons stated in our opinion, as follows:

> ". . . even if the list of twenty had been selected from the general venire list, it would nonetheless remain true that six Negroes were purposely included in that list of twenty because of the fact that they were Negroes; that the identities of the six Negroes so included were known to the jury commissioners; that they knew also that the grand jury to be chosen from that list of twenty was to consider whether to return an indictment against Collins, and that no other case was scheduled to be considered by that grand jury." 329 F.2d at 104.

(3) Appellee urges: "At page 10 of the March 11th opinion, it is stated that Collins was indicted for aggravated kidnapping. The only suggested source of this finding is in appellant's brief, for Collins was not indicted for aggravated kidnapping." The order of the State Court appointing counsel to represent Collins

stated that he was ". . . charged with the crimes of aggravated rape, aggravated kidnapping, and attempted murder by warrants signed by this Court . . . ." (R. p. 29.) He was not, however, indicted for aggravated kidnapping, but was indicted for aggravated rape and attempted murder (R. p. 5). This correction, though immaterial, is made for the sake of accuracy.

In the list of twenty from which the foreman was selected and the other eleven grand jurors drawn, six Negroes were purposefully included because they were Negroes. The other fourteen on the list of twenty were white persons. In such an organization of the grand jury, there was discrimination against Collins because of his race or color and he was deprived of the equal protection guaranteed by the Fourteenth Amendment. *Cassell v. Texas*, 1950, 339 U.S. 282; *Akins v. Texas*, 1945, 325 U.S. 398; *Hill v. Texas*, 1942, 316 U.S. 400. That was the extent of our holding. *Collins v. Walker*, 5 Cir. 1964, 329 F.2d 100, 105.

Except for numbers, the grand jury was organized according to a system remarkably like that considered in *Hill*, *Akins* and *Cassell*, *supra*. As said in *Cassell*, "Acting under the Texas statutes, the Dallas County grand-jury commissioners chose a list of sixteen males for this September 1947 grand jury from citizens eligible under the statute. The judge chose twelve of these for the panel. No challenge is now made to the fairness of this statutory system. We have approved it." 339 U.S. at 283, 284. As further observed in *Cassell*, the grand-jury commissioners for 21 consecutive

lists subsequent to the *Hill* case had limited Negroes in the list of 16 selected for grand jury service to not more than 1 on each grand jury. 339 U.S. at 285, 286. Mr. Justice Reed said that, "If, notwithstanding this caution by the trial court judges, commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution. Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." 339 U.S. 286. ". . . the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible." 339 U.S. 286, 287. "Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." 339 U.S. 287. Chief Justice Vinson and Justices Black and Clark concurred in the opinion of Mr. Justice Reed. Justices Burton and Minton concurred in the opinion of Mr. Justice Frankfurter, who said: "It (the Constitution) does command that no State purposefully make jury service turn on color." 339 U.S. 291. "The basis of selection cannot consciously take color into account." 339 U.S. 295. Mr. Justice Clark, also concurring, recognized the holding that there must be no "pur-

poseful systematic limitation of the number of Negroes on grand juries," 339 U.S. 296; and "that representation on the grand jury by race in proportion to population is not permissible for there must be 'neither inclusion nor exclusion because of race.' " 339 U.S. 298. Mr. Justice Jackson dissented on the ground that the defendant had not been harmed by the method of selection of the grand jury. 339 U.S. 305.

The main difference between this *Collins* case and the *Cassell* case is that in *Cassell* one Negro was purposefully placed on the list of sixteen from which the grand jury was selected, while in *Collins* six Negroes were purposefully placed on the list of twenty from which the grand jury was selected. In both instances, the basis of selection was race. That is the fatal defect.

The appellee's most serious apprehensions relate to the effect of our holding on the "general venire list" of three hundred persons. La.Rev.St. 179. We recognized (see 329 F.2d 105) the affirmative constitutional duty resting upon the jury commissioners ". . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service." *Hill v. Texas, supra*, 316 U.S. at 404, followed in *Avery*

v. Georgia, 1953, 345 U.S. 559, 561. We further recognize that "our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." *Brown v. Allen*, 1953, 344 U.S. 443, 474. Further, in *United States ex rel. Seals v. Wiman*, 5 Cir. 1962, 304 F.2d 53, 67, we stated that "very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion of Negroes from jury service. *Brown v. Allen*, 1953, 344 U.S. 443, 471, 73 S.Ct. 397, 97 L.Ed. 469." Thus it may be that the "general venire list" of three hundred persons is required to reflect a suitable cross-section of the population, and that the jury commissioners have an affirmative duty to include qualified Negroes in that list. If such a requirement and duty have once been met in compiling the "general venire list" no repetition is necessary or even allowed in the selection of the list of twenty "therefrom." Certainly, as to the list of twenty, the basis of selection cannot consciously take race or color into account. There may be a very real distinction in this respect between the "general venire list" of three hundred and the "list of grand jurors" consisting of the names of twenty citizens selected "therefrom."

We limited our holding in the present case as follows: "The only list of importance to the decision

of this case is the list of twenty from which the foreman was selected and the other eleven grand jurors drawn." 329 F.2d 105. The question of whether it would be a denial of equal protection of the laws to intentionally include names of persons selected on the basis of individual qualifications and also on the basis of race in the "general venire list" of three hundred is not here before us and is not decided.

The appellee's second petition for rehearing is

DENIED.

JONES, Circuit Judge, Concurring Specially:

Systematic inclusion of Negroes on a jury, as well as systematic exclusion, is in violation of the due process clause or the equal protection clause, or both. The representation of the respective races on juries must not be proportional, but too few of one race or too many of the other may be evidence of discrimination. The basis of selection cannot consciously take color into account, yet as Judge Rives so aptly says, that in the general venire list, it may be that "the jury commissioners have an affirmative duty to include qualified Negroes in that list." Thus it seems that perhaps Negroes must be included in the general venire list, although it will be assumed that this is not to be done purposefully lest the Constitution be infringed.

The systematic inclusion of Negroes on the grand jury which indicted Collins rendered the indictment and all subsequent proceedings invalid. No difficulty is anticipated in the selection of a grand jury to indict

and a petit jury to try the appellant in compliance with the principles which the courts have announced.

DAWKINS, JR., District Judge, Dissenting:

Originally I concurred in the majority opinion on grounds different from those therein expressed, with a footnote reserving grave doubts as to the soundness of the majority's views. To further clarify my position now, I attach a copy of the original opinion (Appendix A). As I noted therein, the majority decision now rendered indeed places jury commissioners, in both state and federal courts, in a virtually insoluble dilemma, where compilation of a constitutional jury list may be an impossibility. Furthermore, it is directly contrary to the ruling of the United States Supreme Court in *Akins v. Texas*, 325 U.S. 398 (1945).

In *Akins* the jury commissioners selected sixteen names and placed them on a list from which twelve grand jurors were chosen. The commissioners were instructed not to discriminate against Negroes, and in carrying out this instruction they intentionally selected *one* Negro and placed his name on the list of sixteen. Of course, in that case the contention was that there was discrimination because of the limitation of Negroes on the list to only one. The Court held that discrimination had not been proved.

The dissenting justices in *Akins* expressed their views in a manner almost exactly like that now adopted by the majority here. At page 410 in his dissenting opinion Justice Murphy stated:

"* * * By limiting the number to one

> they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All those except the one Negro were required to be of white color. At the same time, by insisting upon one Negro, they foreclosed the possibility of choosing sixteen white men on the panel. They refused, in brief, to disregard the factor of color in selecting the jury personnel."

It is as apparent as apparency can be that the majority in the present case is reasoning as the minority did in the *Akins* case. For example, in the original opinion here, that has since been withdrawn, but now is disclosed by this dissent, the majority stated:

> "The prohibition is often referred to as being against the systematic exclusion of Negroes from jury service because of their race or color. Systematic *in*clusion of any limited number of Negroes because of race means, however, a corresponding systematic exclusion of Negroes from the remaining number on the venire. For example, while improbable, it is by no means impossible that a grand jury drawn from the general venire list of 300, assuming that list to be prepared without racial discrimination, might have contained more Negroes than the five who sat on the grand jury which indicted Collins."

And in the substituted opinion of the majority states:

> "* * * Six Negroes were deliberately

> included in this list of twenty because of their race. When to this circumstance is added the additional facts then known to the jury commissioners that the grand jury to be chosen from that list of twenty was to consider whether to return an indictment against Collins, and that no other case was scheduled to be considered by that grand jury, the conclusion becomes inescapable that in the organization of the grand jury which indicted Collins there was discrimination against him because of his race or color."

It is not mentioned at all that we were informed in oral argument, undisputed by appellant's counsel, that one of the six held a Ph. D. degree, and that the other five were successful businessmen or farmers—indepen lent, reasonably educated men. They were not mere "Uncle Toms," who had any economic or physical compulsion against them, regardless of their actions as grand jurors.

In denying the second petition for rehearing, the majority has stated that the jury commission did not know that no other case would be referred to the grand jury, although it knew at the time of selection that only Collin's case then was pending. Thus the decision rests solely on the intentional *in*clusion of Negroes on the jury venire. Consequently, the opinion in effect holds that the intentional placing of the names of six Negroes on the list of twenty from which the grand jury was chosen discriminated against Collins, a Negro. What greater *non sequitur* can there be? Such a holding is precisely contrary to the ruling by the

Supreme Court in *Akins v. Texas*, *supra*. It cannot rationally be argued that the Court there did not consider the position now asserted by the majority, for the simple reason that the same contentions were advanced by the dissenting opinion in *Akins* and *rejected*.

The opinion by the majority (in which Judge Jones evinces a somewhat reluctant special concurrence) relies almost entirely—if not entirely—upon *Cassell v. Texas*, 339 U.S. 282 (1950), where, in my opinion, loose language was used to the effect that: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither *in*clusion nor exclusion because of race." (Emphasis added.) In support of this conclusion, the following remark from Justice Frankfurter's concurring opinion is quoted: "The basis of selection cannot consciously take color into account."

A fair and profound analysis of *Cassell* will clearly show that the above quotations as to *in*clusion are purely *dicta*, nothing more or less. The Court stated that the reason for granting certiorari was ". . . to consider petitioner's claim that in this case Negroes were omitted from the list of grand jurymen either because of deliberate limitation by the Dallas County jury commissioners, or because of failure by the commissioners to acquaint themselves with available Negroes." In that part of the opinion in which the Court discussed the fact that proportional representation of races on a jury is not a constitutional requisite, it made the passing statement that there should be

neither inclusion nor exclusion because of race.

But in the very next sentence, immediately following, the Court stated: "Our holding that there was discrimination in the selection of grand jurors in this case, however, is based on another ground." It then discussed in detail the failure of the jury commissioners to familiarize themselves with eligible jurors without regard to race. It was carefully emphasized that they admittedly knew members of the white race, but since they had made no *conscious* effort to acquaint themselves with qualified Negroes and other minority groups, they had used a system which resulted in racial discrimination and was unconstitutional. Whether or not intentional *inclusion* of Negroes would have been unconstitutional was not before the Court or involved in the case, and only mentioned in passing.

In *Cassell* there was no majority opinion as such, but a 4-3-1 split, with one justice not participating. See "The Supreme Court, 1949 Term," 64 Howard Law Rev. 127 (1950).

The slight weight to be given *dicta* is clearly stated in *Cohens v. Virginia*, 6 Wheat. 264, (1821):

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury v. Madison*. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judg-

> ment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The actual holding in *Cassell* has been digested accurately in 31 Am. Jur., *verbo* Jury § 98, as follows: "Discrimination in selecting a jury on racial grounds means purposeful, systematic *noninclusion because of color or race.*" (Emphasis added.) The Supreme Court earlier stated the same rule in this manner:

> "* * * What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in empaneling of the petit jury, there shall be *no exclusion* of his race, and no discrimination against them, because of their race or color." *Martin v. State of Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497. (Emphasis added.)

If I am wrong in this analysis of *Cassell*, and I am convinced otherwise, then it would be logical to conclude that all juries, grand and petit, state and federal, which have been selected since that decision, throughout the nation, wherever significant racial or ethnic differences exist and where jury commissioners consciously and conscientiously have attempted to constitute jury lists on a non-discriminatory, representa-

tive basis, then all indictments and convictions in such areas have been unconstitutional and invalid. This, I cannot believe the Supreme Court ever meant to be.

The Court first applied the Fourteenth Amendment to prohibit discrimination against Negroes in the selection of jurors in *Strauder v. West Virginia*, 100 U.S. 303 (1879). It then held that a State could confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons meeting certain educational requirements. The Court recognized that the Fourteenth Amendment was designed primarily to make Negroes full citizens and as to the selection of juries Negroes were to be treated equally with whites.

At the same term, in *Virginia v. Rives*, 100 U.S. 313, 322-323, the Court stated, "It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no *exclusion* of his race, and no discrimination against them because of their color." (Emphasis added.)

Neal v. Delaware, 103 U.S. 370 (1880), reiterated the proposition that *exclusion* of Negroes from juries because of their race or color was unconstitutional. Over and over again, the Supreme Court, in the last 80 years, has emphasized and re-emphasized the same rule concerning *exclusion* from jury lists because of race. *Bush v. Kentucky*, 107 U. S. 110 (1883); *In Re Wood*, 140 U. S. 278 (1891); *Gibson v. Mississippi*, 162 U. S. 565 (1896); *Carter v. Texas*, 177 U. S. 442

(1900); *Rogers v. Alabama*, 192 U. S. 226 (1904); *Martin v. Texas*, 200 U. S. 316 (1906); *Norris v. Alabama*, 294 U. S. 587 (1935); *Hollins v. Oklahoma*, 295 U. S. 394 (1935); *Hale v. Kentucky*, 303 U. S. 613 (1938); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Smith v. Texas*, 311 U. S. 128 (1940); *Hill v. Texas*, 316 U. S. 400 (1942); *Akins v. Texas*, 325 U. S. 398 (1945); *Patton v. Mississippi*, 332 U. S. 463 (1947); *Branson v. North Carolina*, 333 U. S. 851 (1948); *Cassell v. Texas*, 339 U.S. 282 (1950); *Ross v. Texas*, 341 U. S. 918 (1951); *Brown v. Allen*, 344 U. S. 443 (1953); *Avery v. Georgia*, 345 U. S. 559 (1953); *Hernandez v. Texas*, 347 U. S. 475 (1954); *Reece v. Georgia*, 350 U. S. 85 (1955); *Eubanks v. Louisiana*, 356 U. S. 584 (1958); *Coleman v. Alabama*, . . . U. S. . . . (May 4, 1964), 32 L.W. 4379.

In order to insure that there is no exclusion of persons because of their race, the Supreme Court has directed jury commissioners to make a *conscious* effort to select a jury composed of a *cross-section* of the community. In *Brown v. Allen*, 344 U. S. 443, 474 (1953), Justice Reed, speaking for the majority, stated:

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, *so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.*" (Emphasis added.)

In making their selection of prospective jurors commissioners, *must*, indeed, are bound, to acquaint themselves with qualified members of all races and use a method which will insure selection from each major racial group. *Hernandez v. Texas, supra; Cassell v. Texas, supra, Hill v. Texas, supra; Smith v. Texas, supra.* In the latter case a unanimous court held: "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them." Thus it was ruled that a commissioner who knows no Negroes must make a *conscious* effort to learn of qualified Negroes and select some of them in order not to discriminate.

On May 30, 1962 (reh. den. June 29, 1962), in *United States v. Wiman*, 304 F. 2d 53, at page 60, Judge Rives, the organ of the Court here, said:

> "Prior to 1960, the Commissioners personally handed out the majority of the pink application cards (the remaining applicants came by the office), and they handed them out only one at a time to individuals whom they knew, although on one or two occasions Commissioner Allen thought he had asked a Negro minister for the names of qualified Negroes. The only sources of Negro applicants the Commissioners could name were the waiters at Morrison's Cafeteria, the Negroes working at the downtown hotels, those at the shoe shine parlors, mail carriers, and a few they came in contact with through his

ness. Commissioner Allen noted that they often choose names from the rosters of various organizations such as the Junior Chamber of Commerce or the Kiwanis Club. When asked if he had ever used the roster of a Negro Club or association, he replied no, that no one had ever given him one. Both the Commissioners admitted that the bulk of their friends, social contacts, and acquaintances were white. *On the basis of this evidence we see no sufficient effort to solicit the names of qualified Negroes beyond the admittedly narrow circle of ordinary contacts of the Commissioners.*" (Emphasis added.)

In *Moore v. New York*, 333 U.S. 565 (1948), the Court indicated that the record was devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty, and thus the conviction of Negro defendants was sustained. One jury commissioner testified that he must have interviewed at least 500 Negroes and accepted maybe two or three dozen. Obviously, therefore, there was a conscious effort to obtain members of the Negro race to serve on juries, and clearly, in the absence of this intentional inclusion of some Negroes, the Court surely would have found that there had been discrimination.

Another plainly apparent mistake in the majority's ruling here is that it does not explain adequately how intentional inclusion of Negroes on a grand jury could discriminate against a Negro accused. What evidence there is on the point tends to indicate that in-

clusion of six Negroes on the list substantially exceeded the proportion of Negroes in the parish. I already have alluded to the quality of the six. It surely is an unwarranted affront to such high type citizens of the Negro race to assume that they would discriminate against other members of their own race when serving upon a Grand Jury, in secret session, and requiring at least nine members to vote for an indictment. Louisiana Constitution 1921, Article 7, § 42.

There has been no proof, nor proffer of proof, that substantially would establish that the jury commissioners purposely limited the number of Negroes placed on the grand jury venire. In fact, the evidence definitely shows that each commissioner acted separately, not knowing how many persons of each race would be placed on the list by the other commissioners. It is clear beyond dispute that in this case, if anything could be made clearer, this defendant was *benefited* by the intentional inclusion of Negroes, not discriminated against; and it must be remembered that he was indicted and convicted of a henious crime—aggravated rape, which conviction was affirmed by the Louisiana Supreme Court. Moreover, the Supreme Court never has sustained a defendant's objection to exclusion of a group from jury service except when the defendant was a member of the excluded class, *Fay v. New York*, 332 U.S. 261, 287 (1947); and it *never* has voided an indictment or conviction for conscious *in*clusion of members of the same race or ethnic group.

The Court has directed States unequivocally not to *exclude* Negroes intentionally from grand jury lists, and now the majority here directs States not to *include* them intentionally. To me, this fundamentally cannot follow and is impossible of accomplishment. Nevertheless, the Supreme Court repeatedly has upheld the right of States to use selection procedures not based solely on chance but designed to select *intelligent* and *morally fit* jurors. LSA-R.S. 15:172 (1950), among other things, requires jurors to be literate and of good character. *Ergo*, jury commissioners here and in all States, not only must know these things, but in learning of them must know their race. This is a *sine qua non*.

This simple question may be posed—and I believe there is only one inescapable answer to it—how can a constitutional jury be formed in either a state or federal court if jury commissioners do not intentionally include members of various races? This problem was recognized, at least partially, by Judge Jones in his concurring opinion in which he agrees with Judge Rives that "it may be that 'the jury commissioners have an affirmative duty to include qualified Negroes in that list [the general venire list].' " But in the next sentence he seems to contradict himself when he states that "it will be assumed that this is not to be done purposefully lest the Constitution be infringed." With all respect, to me this is a *non sequitur* in light of the unbroken line of Supreme Court decisions (and of this Court, see *Wiman*, *supra*), holding that jury commissioners have an *affirmative* duty to seek out, and place on such lists, qualified Negroes.

Gibson, in *Racial Discrimination on Grand Juries*, 3 Baylor Law Rev. 29, 38-39 (1950), referring to certain language in the *Cassell* case, quite appropriately stated:

> * * * the Court has disregarded the psychic nature of a prejudice—racial or otherwise. It is a sad fact, that notwithstanding the best and most noble efforts of all, our society discerns a difference between men on the basis of color. That prejudice can be rooted out only by stern combat within the minds of individual men. The rules of combat must be shaped by expanding and developing social institutions; the approaches to battle must be through those institutions; the motivation to attain and secure the objective must come from within those institutions. This end cannot be accomplished by the court's requirement of a process of selection of jurors which will make any ascertainable racial representation completely dependent upon chance. How can there be chance until there is open-mindedness? A prejudice exists. It will pass, men of good-will hope, with the passage of time, but there must be the conscious recognition of it, the regret for it, the desire to destroy it, and finally the taking of action to abolish it. The design will have to be there, but systematic approach has been outlawed. If the Negro is systematically excluded, the Court condemns; if he is systematically included, the Court condemns. But the prejudice that has pointed out the Negro in the social system since before the founding of the Republic still points him out. All

> that can be done now is wrongfully to exclude him absolutely, or genuinely strive to give him equal share of that which is rightfully his. But the direction taken, and each step thereon, must be a *conscious* one. Where human discretion is a factor in selection, a general prejudice cannot be purged immediately and completely. The only way to counteract a prejudice is through a purposeful effort, which inevitably must take on a design. A prejudice can not merely be forgotten. It is a psychic force that must be met with a psychic force." (Emphasis added.)

To know whether a prospective juror is qualified, a jury commissioner or the person recommending him to the commissioner must know who he is. To know a man requires that his race be known. If the commissioner knows he must *not exclude* Negroes, then he consciously will attempt to include them. To do so does not violate equal protection of the laws, because whites are also intentionally included. Each race is treated equally. How else can the Supreme Court's positive mandates for jury selection from a reasonable cross-section of the community be met?

If the majority opinion held that there had been intentional inclusion of a token number of Negroes and that this discriminated against Collins, that would accord with the rationale of *Cassell;* but the facts here conclusively contra-indicate a mere token inclusion. This is a case where the jury commissioners unquestionably made a good-faith effort to place a representative cross-section of the community on the general

venire and grand jury list. To hold that their action is unconstitutional because they knew which of those selected were whites and which were Negroes, is totally unfounded in law and absolutely opposed to the Supreme Court rulings in *Akins* and *Brown v. Allen*, *supra*.

Upon original hearing, an erroneous interpretation was made by me of certain evidence in the transcript. Since that evidence was the basis of my special concurrence in the original opinion, it is appropriate to set forth the pertinent portions of the brief by the Louisiana Attorney General setting the record straight:

> "Notwithstanding the fact that the Court expressly held that 'Even if the list of 20 had been selected from the general venire list. . . .' this would not change the decision, the fact remains that from page 5 of the opinion through the first paragraph of page 11, the Court attempts to make out a case for a finding that the twenty names selected for the grand jury venire were in addition to the list of 300 names on the general venire.
>
> "In this connection, Your Honors will recall that no argument was ever made by anyone suggesting this interpretation of Mr. Arceneaux's testimony. If you would but ask attorneys for appellant they will readily affirm that you are in error. Surely you do not want to perpetuate an erroneous finding which has not been suggested nor defended by any counsel in this case.

"To understand Mr. Arceneaux's testimony, you should consider the requirements of the Louisiana law which were carefully followed by this Jury Commission. In 1958 these Jury Commissioners were appointed. The jury venire which had been made up by the previous Jury Commission was purged. Therefore, the new Jury Commission started with an entirely new list of 300 names. On the same day that this Jury Commission made up the list of 300 names, they were ordered to select 20 names from this venire to make up the grand jury venire. In accordance with the further orders of the trial court, they proceeded that same day to draw by lot from the remaining 280 names a list of 40 names to serve for the criminal petit jury term of Court. Then they proceeded to draw by lot from the remaining 240 names a list of 35 names for the civil petit jury term of Court.

"Six months later the Jury Commission was ordered to meet and add to the remaining names on their original list which now contained only 205 names, so that the general venire list would have 300 names on it. Then in accordance with the trial court's order they proceeded to select 20 names for the grand jury venire. Then they drew by lot an additional 40 names for the criminal petit jury venire and they drew by lot an additional 35 names for the civil petit jury venire.

"This procedure was carried out each of the five times that they met prior to the

time that they drew the venire which has been declared discriminatory by the Court's March 11th opinion.

"With this brief summary of the Jury Commission's method of selecting jury venires, it is readily apparent that the testimony of Mr. Arceneaux to the effect that the grand jury venire of 20 names was selected from 'the additions to the 300' means simply that the names selected for grand jury duty were not taken from the 1958 list. Instead the grand jury venire was taken from those names added to the 1958 list, which 1958 list had been depleted because of the removal of those names drawn or selected for the various juries drawn since 1958. The additions to the 1958 list had to be made so that each selection and drawing could be made, in accordance with the law, from a list of 300 names.

"At no point did Mr. Arceneaux or anyone else say that the list of 20 names selected for the grand jury was 'in addition' to the list of 300 names which make up the general venire.

"On page 10 of the opinion of March 11, 1964, the Court states 'Appellee concedes that Mr. Arceneaux so testified. . . .' Our supplemental brief signed by us on Jan. 3, 1964 is subject to this interpretation, for on page 4 of our brief at the outset of paragraph numbered 'V.' we stated — 'If the grand jury had actually been selected according to Mr. Arceneaux's version, . . .' etc. It was not our intention to so concede

and what we meant to say was — 'If the Grand Jury venire had actually been selected according to the Court's interpretation of Mr. Arceneaux's version, . . .' etc. The plain and obvious fact is that Mr. Arceneaux's testimony did not mean what the Court held that it meant. And we respectfully pray that the Court correct this error."

It should be noted also that in the absence of evidence to the contrary, there is a presumption that officers in charge of the selection of a jury panel have performed their duty lawfully. *Tarrance v. Florida*, 188 U.S. 519 (1903). See Anno. 1 ALR2d 1291, 1296 (1948). The *proces verbal*, an official record of the State Court, as to the procedure here employed by the jury commission, clearly refutes the incorrect inferences I drew, and the majority now draws, from the testimony of the Commissioners.

It is interesting to note that the Judicial Conference of the United States has suggested that the letter to key-men who suggest prospective jurors for federal jury service include the following statement: "In making up this list, *we ask that you make a conscious effort to include* both men and women *from a variety of backgrounds* and occupations so as to give us, as nearly as possible, *a representative cross-section of your community.*" (Emphasis added.) 26 F.R.D. 409, 514 (1960).

For these reasons I hereby withdraw my former special concurrence in the original opinion, my concurrence in the second opinion, and I respectfully

dissent from the denial of the second petition for rehearing.

I consider it my duty, notwithstanding my lesser official position, insofar as the majority is constituted, to "stand up and be heard" on this grave constitutional question. Hence I render this dissent with all the sincerity I possess.

ADDENDUM TO DISSENT

DAWKINS, JR., District Judge:

Since the above dissenting opinion was written, and forwarded to Judge Rives for filing and printing, I have been advised that the Louisiana Legislature unanimously has passed its Act No. 161 of 1964, approved by the Governor, and, under the Constitution of this State, to become a part of its statutory laws on July 29, 1964, reading as follows:

LEGISLATURE OF LOUISIANA
ACT NO. 161 OF 1964

To amend and re-enact as amended Section 180 of Title 15 of the Louisiana Revised Statutes of 1950, and to repeal all laws in conflict therewith.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Section 180 of Title 15 of the Revised Statutes of 1950 be amended and re-enacted as follows:

SECTION 180—SELECTION OF GRAND JURIES.

Immediately after completing the gen-

eral venire list, the commission shall select by drawing indiscriminately and by lot therefrom the names of twenty citizens, possessing the qualifications of grand jurors, who shall be subject to duty as grand jurors during the term of six months after the grand jury is empaneled and until a succeeding grand jury shall have been empaneled.

The names of the persons so selected shall be written or typewritten on slips of paper, with no designation as to race or color, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and endorse thereon the words "List of Grand Jurors."

Section 2: All laws or parts of laws inconsistent and in conflict herewith are hereby repealed.

Unanimously adopted by the House of Representatives and Senate of the Louisiana Legislature, and approved by the Governor, July 4, 1964.

To me, this clearly cures the gross constitutional mistake created by the majority opinion from which I still vigorously dissent. Moreover, it sets an optimum example of which both State and Federal courts throughout the nation might well take heed, in light of what I respectfully consider to be an impractical, impossible, indeed, wholly unjustifiable ruling by the majority, which flies directly into the teeth of the Supreme Court's prior mandates.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20537

WOODMAN J. COLLINS,

Appellant,

versus

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(December 6, 1963.)

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

RIVES, Circuit Judge: Collins, a Negro, was convicted and sentenced to death under an indictment charging him with aggravated rape upon a white woman. The conviction and death sentence were affirmed by the Supreme Court of Louisiana, *State v. Collins*, 1962, 138 So.2d 547. Certiorari to the Supreme Court of the United States was denied, 371 U.S. 843.

His petition for habeas corpus to the United States District Court claimed that his conviction was violative of the Constitution of the United States in three respects: 1) He was discriminated against because of his race or color in the organization of the grand jury which indicted him; 2) he was mentally unable to stand trial, an imbecile not able to assist counsel in his defense; 3) his conviction was procured in part by an unconstitutionally coerced confession.

Each of these contentions had been raised and decided against him upon his trial and upon appeal to the State Supreme Court. It is therefore properly conceded that he has satisfied the requirement of 28 U.S.C.A. §2254, that state remedies be exhausted before a federal court may grant an application for habeas corpus. 28 U.S.C.A. §2254; *Brown v. Allen*, 1953, 344 U.S. 443, 447-450; *Fay v. Noia*, 1963, 372 U.S. 391, 426, et seq.

At the request of the district court, a copy of the record and transcript of proceedings in the State courts was presented and filed with the district court. Upon the basis of that record and transcript, and without taking additional evidence, the district court denied the application for habeas corpus. *Collins v. Walker*, E.D. La. 1963, 215 F.Supp. 805. Thereafter, the district judge issued a certificate of probable cause in accordance with 28 U.S.C.A. §2253, and permitted the prosecution of this appeal in forma pauperis.

It is settled that a federal district court may, in its discretion, refuse the writ of habeas corpus without hearing additional evidence, if the court is satisfied,

by an examination of the record and proceedings in the State court, that the issues have been adequately litigated, that the state process has given fair consideration to the issues and the evidence, and has resulted in a legally satisfactory conclusion, and that no unusual circumstances calling for a hearing are presented. *Brown v. Allen*, *supra*, 344 U.S. at 463. The Supreme Court has, however, recently emphasized that, "Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts." *Fay v. Noia*, *supra*, 372 U.S. at 422. The Supreme Court in *Townsend v. Sain*, 1963, 372 U.S. 293, 313, set forth the tests with more particularity:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

On the first question, that of racially discriminatory organization of the grand jury, we agree with the

district court that the evidence introduced in the state court proceedings was adequate, indeed undisputed, but we reach a conclusion opposite to that reached by the state courts and by the district court.

1) Indictment is the only method provided by the law of Louisiana for the institution of the prosecution of a capital offense. La.Rev.St. Title 15, § 2. A jury commission for each parish is selected and appointed by the district judge. La.Rev.St. 15:175. At the time ordered by the district judge, the jury commission meets at the office of the clerk of the district court and selects from the persons qualified to serve as jurors for their parish three hundred persons as the "general venire list." La.Rev.St. 179. The next section provides the method of selecting a grand jury.

> "§180. *Selection of grand jury*
>
> "Immediately after completing the general venire list, the commission shall select *therefrom* the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled.
>
> "The names of the persons so selected shall be written on slips of paper, by the clerk, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and indorse thereon the words:

'List of Grand Jurors.' " (Emphasis supplied.)

Negroes constitute a substantial proportion of the population of Jefferson Davis Parish. Mr. Arceneaux, the member of the Jury Commission from Ward 2, testified that the population in that ward was about 75% white and 25% Negro, that being the "heaviest concentration of colored people in Jefferson Davis Parish."

Mr. Arceneaux had served on the Jury Commission since 1958. In that year the Jury Commission prepared the original "general venire list" of 300 persons.

"Q. Would you tell the court what sort of instructions you were given and who gave them to you?

"A. When we were appointed on the Committee we were given instructions as to who was eligible and ineligible for jury duty by written instructions from the Judge. We have been from time to time reminded by the Judge that in picking the jury to just be careful that there should be both white and colored members on the jury. Other than this I would say we've had no instructions."

Some Negroes were included in this original list of 300 but Mr. Arceneaux did not recall how many. "We have met twice annually for the choosing of additional names to add to the lst (sic) to replace the juries that have been drawn out of that original list."

Mr. Arceneaux further testified:

"Q. Now, have there been three grand and petit juries drawn from this list since it was prepared?

"A. From that list, no.

"Q. How many have been drawn or do you know?

"A. I think there would have been five grand juries drawn since we've been on. It's either four or five.

"Q. Now, Mr. Arceneaux—

"A. They are not taken from that list of three hundred.

"Q. Sir?

"A. That grand jury was not picked out of that original group of three hundred.

"Q. It was not?

"A. No.

"Q. How was that—

"A. The grand jury is picked by names in the additions to the three hundred.

"Q. In additions to the three hundred?

"A. Correct."

Again Mr. Arceneaux testified:

"Q. Do you have any idea how many colored people are presently in the venire list of three hundred?

"A. That would be a hard question to answer. I don't know I could even give an estimate because we have drawn a lot of the original names and it would be hard—well, it would be impossible for any individual member of the Commission to say, because the names when they are submitted are not submitted as colored or white, they're submitted as names and we know in our selection

what they are but when they are put in the box there is no way in distinguishing between them.

"Q. But when you do draw the grand jury out you do know whether they are colored or white?

"A. The grand jury is named before the names are put in the box, yes, we do know whether they are colored or white.

"Q. Now, as I understand it, when you prepare the grand jury you don't look in the box of three hundred and select out twenty names? You simply get together and you all select twenty names, period, and put them on there. Is that right?

"A. That's correct."

At each grand jury was selected, the Jury Commission was instructed by Mr. Charles A. Pitre, the Clerk of the District Court, that some Negroes should be included. As Mr. Arceneaux testified:

"A. That instruction, each time that we had met, has come from Mr. Pitre that there should be some colored representation on each grand jury.

"Q. I see.

"A. But not any specific instructions other than that we should attempt to do that each time."

At the time of Collins' arrest on April 8, 1960, there had been recently empaneled for Jefferson Davis Parish a regular grand jury for the six months commencing March 21, 1960. There was no Negro on that grand jury for the reason thus stated by Mr. Arceneaux:

"Q. Now do you know what reason why you did not put any on the grand jury immediately prior to the grand jury under which this man was indicted?

"A. I had put some on the previous and I was depending on some one else to put someone on the previous grand jury and in the course of events when we finished putting the names in it turned out that all of us had depended on someone else putting the names in and it so happened none of us did."

Mr. Arceneaux further testified:

"Q. Now, Mr. Arceneaux, how many Negroes did you put on the grand jury panel or the twenty names prior to this particular one and prior to the one that you failed to put anyone on? About how many had you—

"A. I think that I had always put at least one on the grand jury panel on all of the grand juries that have been selected except the one immediately preceeding (sic) the present grand jury."

Collins' case was not presented to the grand jury empaneled when he was arrested, but instead he was held in jail for six months until October 5, 1960, at which time six Negroes were purposely placed on the list of twenty names, from which the district judge

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[1] Mr. Strohe, the member of the Jury Commission from Wards 6 and 7, testified that there were very few Negroes in Ward 7, but about 36% of the population of Ward 6 was colored. He further testified:

"Q. . . . Now, do you recall how many Negroes were put

drew a grand jury composed of five Negroes and seven whites.

It was this grand jury which indicted Collins for aggravated rape and also for aggravated kidnapping and attempted murder. No other case was presented to this grand jury.

The State's position was that, instead of systematic *exclusion* of Negroes from the grand jury which returned the indictment, there was a purposeful *inclusion* of Negroes. As said by the State trial judge: "It seems entirely reasonable to this Court that the Jury Commission in noting its error of failing to have any Negroes on a Grand Jury did attempt to remedy this error by placing more Negroes on the subsequent Grand Jury."

The Louisiana Supreme Court held that this method of selecting a grand jury did not offend the Constitution of the United States, and quoted from its previous holding in *State v. Green*, La. 1952, 60 So.2d 208, 212, as follows:

> on the grand jury venire of twenty names which is the present grand jury?
>
> "A. Actually of the five of us we have our Wards designated and we feel responsible for those particular Wards, and to say exactly how many was put on, I wouldn't know but I can speak for myself for 6 and 7.
>
> "Q. Well how many were put on from 6 and 7?
>
> "A. I think one from 6 and none from 7. . . ."
>
> Mr. Johnnie Robert Benoit, the Jury Commission member representing Wards 5, 8 and 9, testified that on the list of 20 names from which the court drew the grand jury which indicted Collins:
>
> "Q. And how many did you put on?
>
> "A. I put two white man (sic) and one negro which I figured was fair to this man."

"'It would be fallacious, we think, to hold that, because jury commissioners, being concious of the necessity of giving consideration to members of the colored race, as well as those of other races, in the selection of all juries in order to comply with the guarantees of the Fourteenth Amendment to the Federal Constitution, have purposely included Negroes on a jury panel, their forthright action constitutes discrimination in the absence of a showing that there was a planned limitation upon the number of Negroes to be chosen.' (221 La. at 726, 60 So.2d at 212.)".

State v. Collins, supra, 138 So.2d at 551.

We do not agree. In the *Green* case, the Louisiana Supreme Court attempted to distinguish the case of *Cassell v. Texas*, 1950, 339 U.S. 282 (see 60 So.2d at 212). In the instant case, the federal district judge held the *Cassell* case not applicable on its facts (215 F.Supp. at 809). While we would concede that the *Cassell* case is distinguishable on its facts, it is important to note that the Supreme Court, in its opinion, carefully stated the principle that: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." 339 U.S. at 287.

That the use of this language was deliberate and well-studied is shown by the concurring opinion of Mr. Justice Frankfurter:

"The prohibition of the Constitution against

> discrimination because of color does not require in and of itself the presence of a Negro on a jury. But neither is it satisfied by Negro representation arbitrarily limited to one. It is not a question of presence on a grand jury nor absence from it. *The basis of selection cannot consciously take color into account.*" (Emphasis supplied.)

339 U.S. at 295.

On principle, we think that must be true. A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. In the historic language of the elder Mr. Justice Harlan:

> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Plessy v. Ferguson, 1896, 163 U.S. 537, 559.

An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an accused is entitled to demand under the Constitution is that in organizing the grand jury there shall be no discrimination against him because of his race or color. *Martin v. Texas*, 1906, 200 U.S. 316, 321.

The Supreme Court has frowned on the use of white tickets to indicate prospective white jurors and yellow tickets to indicate Negroes.

> "Petitioner's charge of discrimination in the jury selection in this case springs from the Jury Commissioners' use of white and yellow tickets. Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate."

Avery v. Georgia, 1953, 345 U.S. 559, 562.

State courts and jury commissions may find somewhat contradictory or confusing the doctrine forbidding the consideration of color as a basis for selecting a venire of jurors and the rule which we stated in *United States ex rel. Seals v. Wiman*, 5 Cir. 1962, 304 F.2d 53, 67, that "very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion of Negroes from jury service. *Brown v. Allen*, 1953, 344 U.S. 443, 471, 73 S.Ct. 397, 97 L.Ed. 469." The reconciliation lies in the observance of the positive, affirmative duty resting upon jury commissioners and other public officials expressed in *Avery v. Georgia*, *supra*, 345 U.S. 559, 561:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill v. Texas*, 316 U.S. 400, 404 (1942)."

Also quoted in *United States ex rel. Seals v. Wiman*, *supra*, 304 F.2d at 66.

Compliance with that duty inevitably results in meeting the evidentiary test prescribed in *United States ex rel. Seals v. Wiman, supra.* The two rules may appear conflicting or confusing when attention is focused on the evidentiary test, but not when there is a good faith effort to comply with the constitutional mandate for which that test is prescribed.

The prohibition is often referred to as being against the systematic exclusion of Negroes from jury service because of their race or color. Systematic *inclusion* of any limited number of Negroes because of race means, however, a corresponding systematic exclusion of Negroes from the remaining number on the venire. For example, while improbable, it is by no means impossible that a grand jury drawn from the general venire list of 300, assuming that list to be prepared without racial discrimination, might have contained more Negroes than the five who sat on the grand jury which indicted Collins.

An opposite and somewhat paradoxical consideration is that the conscious taking into account of race or color as a basis of jury selection may result in injury from the sometimes over-ready complaisance of members of the race of the accused. To paraphrase the language of Mr. Justice Jackson, concurring in the result in *Shepherd v. State of Florida*, 1951, 341 U.S. 50, 55: "I do not see, as a practical matter, how any Negro on the grand jury would have dared to vote against indicting Collins for a capital offense. The only chance Collins had may have been in the courage and decency of some sturdy and forthright white

person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought." Any effort to give to the accused more than the equal protection of the laws may thus well have the practical result of giving somewhat less than equal protection.

Moreover, it is important to note that the guarantee of the Constitution is to "the equal protection *of the laws*." In the four or five grand juries drawn for Jefferson Davis Parish since 1958, the jury commissioners had made no pretense of selecting the names of twenty citizens *from* the general venire list as required by law. La.Rev.Stat. 15:180, quoted *supra*, p. 3. Instead, the commissioners each placed in the list of twenty the names of such Negroes from the Parish at large as "I figured was fair to this man."[1] No matter how benevolent and well-intentioned the jury commissioners may have been, the accused cannot be required to accept their individual sense of fairness in the place of the equal protection *of the laws* to which he is entitled.

We conclude that in the organization of the grand jury which indicted Collins, there was discrimination against him because of his race or color.

Since the judgment of the district court must be reversed and the cause remanded to await a possible reindictment and retrial of Collins, it is not absolutely necessary to decide the other two questions presented

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[1] Testimony of Jury Commissioner Benoit at record p. 152.

by this appeal. True, those questions will probably arise on any subsequent retrial of Collins. Hence, sound judicial administration would ordinarily require that they be considered on this appeal. The difficulty, however, is that, in our opinion, the record is not adequate for their determination. We think that, under the principles heretofore stated (pp. 2 and 3, *supra*), the district court erred in not affording Collins an evidentiary hearing on those two questions.

Perhaps the most important factual consideration upon which each of those questions must be determined is Collins' mental capacity. Dr. Charles E. Sturm, the psychiatrist in charge of the State Criminal Colony at the State Hospital in Jackson, Louisiana, when first introduced as a witness, testified that, accepting the three classifications of moron, imbecile and idiot, he would classify Collins as an imbecile with a mental age range in the vicinity of ten to twelve; that Collins had an I.Q. of 63 (R. p. 170); and that "His performance would seem to indicate a chronic brain syndrome" (R. p. 176).

Dr. Sturm later testified that in stating Collins' I.Q. as 63, which would be feeble-minded (R. p. 347), he had relied on a report from a psychologist to whom he had sent Collins for an I.Q. test, a Mr. Lockridge, and that "He has said that that is not right. He's told me that today. He has said that is should be something in the vicinity of 80. Now, if that is true, your guess in just as good as mine."

Dr. Sturm further testified that a Dr. S. L. Pol-

lock of New Orleans had made a neurological and psychological examination of Collins which "ruled out" a chronic brain syndrome (R. p. 361). Based upon the reports of Dr. Pollock and Mr. Lockridge, Dr. Sturm changed his opinion, and testified:

> "He [Dr. Pollock] said that the neurological examination was completely within normal limits and he found no evidence of a chronic brain syndrome. Now, when we got that report, Mr. Lockridge changed his mind. Considering the changing of his mind the IQ went up. So where, in his opinion, it should be in the vicinity of 80 instead of 63. And because the IQ went up to 80 I'll say that he is not a mental defective case now. He's just an uneducated colored boy."

Neither Mr. Lockridge nor Dr. Pollock testified on the trial in the State court. Their testimony appears only by way of hearsay. The State trial judge commented:

> "Defense counsel did not object to this hearsay information. At the time of the trial Defense Counsel asked to have Mr. Lockridge subpoenaed for the trial of the case. Mr. Lockridge was subpoenaed and was sequestered for two days as a witness during the trial. However, it developed that Mr. Lockridge's re-examination disclosed that Woodman J. Collins had a substantially higher I.Q. that (sic) the first test indicated. It is perhaps for that reason that the defendant's counsel did not see fit to call Mr. Lockridge and he was released without testifying."

The federal district court should not have relied

upon such a record, particularly in a case involving the ultimate issue of life or death. To hold Collins to the ordinary rules of an adversary trial in failing to call Mr. Lockridge as a witness seems to us, in effect, to prejudge Collins' mental capacity to stand trial.

The present record being so totally inadequate, we forego a decision on the other two questions presented by this appeal.

Notwithstanding our holding that the indictment against Collins is unconstitutional and void, Collins is now legally detained upon his commitment to await the action of another grand jury. Collins is, of course, entitled to be tried within a reasonable time, and the district court should retain jurisdiction to meet the unlikely event that further orders and judgments may be necessary or proper. This Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State of Louisiana an opportunity to take the necessary steps to reindict and retry Collins.

Any such reindictment must of course be by a grand jury from which Negroes have been neither systematically excluded nor included. For the guidance of the parties, the Court expresses the present opinion that if Collins is reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Louisiana, subject

to possible review by the Supreme Court of the United States or upon other habeas corpus proceedings.

The judgment of the district court is reversed, judgment here rendered in accordance with the holdings of this opinion, and the cause remanded for any further proceedings which may be found necessary or proper.

REVERSED, RENDERED, and REMANDED.

DAWKINS, JR., District Judge, Concurring specially:

I concur in the result reached by the majority here, but respectfully base my action upon different grounds.

Since at least 1837, when the Supreme Court decided *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, in an unbroken line of cases, that Court has refused to consider constitutional questions when the record discloses other grounds for decision, whether or not they properly were raised by the parties. Some of the later cases reiterating this fundamental principle of judicial action are *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947) (which at 331 U.S. 568-575 sets forth all of the cogent reasons for this policy); *Peters v. Hobby*, 349 U.S. 331, at 338, 75 S.Ct. 790, 99 L.Ed. 1129 (1955); *Neese v. So. Ry. Co.*, 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955); *Clay v. Sun Insurance Office*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed. 2d 1170 (1960) vacating judgment at 265 F. 2d 522 (5 Cir.); and, most recently, *Bush v. Texas*, 372 U.S. 586, at 590, 83 S.Ct. 922, 9 L.Ed. 2d 958 (decided March 25, 1963).

In at least two decisions by this Court in recent years, this principle has been followed: *Byers v. Byers*, 254 F. 2d 205 (1958); and *Lone Star Import, Inc. v. Citroen Cars Corp.*, 288 F. 2d 69 (1961), where it was said:

> "* * * Whatever may be the temptations—or the inability to resist them—in adjudicating ordinary matters either of fact or statutory construction courts are especially cautioned against the determination of constitutional questions not inescapably presented where some other basis less profound is actually available as a ground of disposition. * * *"

Here, although mentioned in passing, and not the basis for the majority opinion, reference has been made to a simple *legal* ground upon which I think we ought to decree the nullity of the indictment under which appellant was convicted, without reaching the constitutional question.

La. Rev. Stat., Title 15:180 provides the method by which State grand juries shall be drawn:

> "Immediately after completing the general venire list, the commission *shall* select *therefrom* the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled.
>
> "The names of the persons so selected shall be written on slips of paper, by the clerk, in

> the presence of the commissioners, and they shall place the slips in an envelope, seal the same and indorse thereon the words: 'List of Grand Jurors.'" (Emphasis supplied.)

It is to be noted that this statute expressly provides that the jury commission "shall" select the twenty persons from which the grand jury is drawn from the "general venire list" of 300 persons, provided for by La. Rev. Stat., Title 15:179. The word "shall" is mandatory, as so used. The Louisiana Supreme Court has held in two cases that where the Legislature, in establishing the method by which grand juries are to be drawn, uses the word "shall," such is mandatory, not merely directory, language; and if not followed literally, any indictments returned by such illegally constituted bodies are absolute nullities. *State v. Kifer*, 186 La. 674, 173 So. 169 (1937) and *State v. McLean*, 30 So. 2d 187 (1947).

In this case, as pointed out by the majority opinion, the jury commissioners violated the express, mandatory requirement of the statute in *not* selecting the 20 names from the "general venire list." Instead they selected the names of 20 persons in addition to the three hundred on the general list. Therefore, having violated the State law, in my opinion, and according to the Louisiana jurisprudence, this indictment was a nullity. It is on that basis—and that alone—that I respectfully, and with full deference to the majority, submit that we should base our ruling. It is a mistake, I feel, that the constitutional question is considered at all; and it is my further opinion, without elabo-

rating," that the majority is basing its constitutional ruling upon dicta in *Cassell*, since that case involved systematic exclusion, not exclusion of Negroes.

" It is difficult, indeed, to reconcile this Court's present holding that there constitutionally can be no "conscious inclusion" of Negroes on jury lists with earlier statements by the Supreme Court, *and by this Court*.

In *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942), then Chief Justice Stone, speaking for a unanimous Court, made the following statement at 316 U.S. 404:

"We think petitioner made out a prima facie case, which the State failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we pointed out in *Smith v. Texas*, *supra*, 131, chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more. *The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by § 1 of the Civil Rights Act of March 1, 1875, 8 U.S.C. § 44, and fully established since the decision in 1881 of NEAL V. DELAWARE, SUPRA—not to pursue a course of conduct in the administration of their office which could operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified negroes. In such a case discrimination necessarily results where there are qualified negroes available for jury service.* ***" (Emphasis added.)

On May 30, 1962 (reh. den. June 29, 1962), *in United States v. Wilson*, 304 F. 2d 53, at page 60, said:

"Prior to 1960, the Commissioners personally handed out the majority of the pink application cards (the remaining applicants came by the office), and they handed them out only one at a time to individuals whom they knew, although on one or two occasions Commissioner Allen thought he had asked a Negro minister for the names of qualified Negroes. The only sources of negro applicants the Commissioners could name were the

Otherwise, I fully agree with what the majority has said, and hereby enter my special concurrence.

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waiters at Morrison's Cafeteria, the Negroes working at the downtown hotels, those at the shoe shine parlors, mail carriers, and a few they came in contact with through business. Commissioner Allen noted that they often choose names from the rosters of various organizations such as the Junior Chamber of Commerce or the Kiwanis Club. When asked if he had ever used the roster of a Negro club or association, he replied no, that no one had ever given him one. Both the Commissioners admitted that the bulk of their friends, social contacts, and acquaintances were white. *On the basis of this evidence we see no sufficient effort to solict the names of qualified Negroes beyond the admittedly narrow circle of ordinary contacts of the Commissioners.*" (Emphasis added.)

To say the least, jury commissioners are being placed in a virtually insoluble dilemma, where a constitutional jury list may be an impossibility.

APPENDIX No. V-A

Louisiana Revised Statutes of 1950
Title 15 No. 179 as amended by Act 303 of 1952.

General venire; drawing of jurors

At the time ordered by the district judge, the jury commission shall meet at the office of the clerk of the district court, and in the presence of two or more witnesses, shall select from the persons qualified to serve as jurors for their respective parishes three hundred persons, a list of whom shall be made under the supervision of the commission, and said witnesses. In the preparation of this list, the slips for use in the general venire box, the proces verbal of the meeting, and in all other proceedings of the jury commission, the clerk of court and said commission may avail itself of the services of a deputy clerk, or of a stenographer; and all names, lists, slips, etc., may be typewritten. This list shall be the general venire list and shall be kept complete and supplemented from time to time as hereinafter enacted. Each of the names on said list shall be written on a separate slip of paper, together with the number of the ward or place of residence of such person, and the slips of paper containing the names selected, except those containing the names of the persons chosen to serve as grand jurors as hereinafter provided, shall be placed in a box which shall be labelled "General Venire Box". As amended Acts 1952, No. 303, § 1.

APPENDIX No. V-B

Louisiana Revised Statutes of 1950 Title 15 No. 180. As amended by Act 303 of 1952 (Since amended by Act 161 of 1964)

Selection of grand jury

Immediately after completing the general venire list, the commission shall select therefrom the names of twenty citizens, possessing the qualifications of grand jurors, to be taken from different portions of the parish, as far as practicable, who shall be subject to duty as grand jurors during the term of six months after the grand jury is empaneled and until a succeeding grand jury shall have been empaneled.

The names of the persons so selected shall be written or typewritten on slips of paper, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and endorse thereon the words "List of Grand Jurors." As amended Acts 1952, No. 303, § 1.

APPENDIX No. V-C

Louisiana Revised Statutes of 1950 Title 15 No. 180 as amended by Act 161 of 1964.

LEGISLATURE OF LOUISIANA
ACT NO. 161 OF 1964

To amend and re-enact as amended Section 180 of Title 15 of the Louisiana Revised Statutes of 1950, and to repeal all laws in conflict therewith.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Section 180 of Title 15 of the Revised Statutes of 1950 be amended and re-enacted as follows:

SECTION 180—SELECTION OF GRAND JURIES.

Immediately after completing the general venire list, the commission shall select by drawing indiscriminately and by lot therefrom the names of twenty citizens, possessing the qualifications of grand jurors, who shall be subject to duty as grand jurors during the term of six months after the grand jury is empaneled and until a succeeding grand jury shall have been empaneled.

The names of the persons so selected shall be written or typewritten on slips of paper, with no designation as to race or color, in the presence of the commissioners and they shall place the slips in an envelope, seal the same and endorse thereon the words "List of Grand Jurors."

Section 2. All laws or parts of laws inconsistent and in conflict herewith are herby repealed.

Unanimously adopted by the House of Representatives and Senate of the Louisiana Legislature, and approved by the Governor, July 4, 1964.

CERTIFICATE OF COUNSEL

I, Jack P. F. Gremillion, a member of the bar of the United States Supreme Court, Attorney for H. L. Hanchey, Warden of the Louisiana State Penitentiary, do hereby certify that the foregoing petition for a Writ of Certiorari in this cause is in good faith and not merely for purpose of delay. I further certify that a copy of same has this day been forwarded to Stephen P. Coco and Herschel N. Knight, attorneys for respondent, Jennings, Louisiana.

Baton Rouge, Louisiana, this day of August, 1964.

JACK P. F. GREMILLION
Attorney General.

3283-B 8-64

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FILED
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No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1964

H. L. HANCHEY, WARDEN,
LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Petitioner,

v.

WOODMAN J. COLLINS,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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BERNARD N. MARCANTEL,
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State of Louisiana.

THOMAS W. McFERRIN,
Special Counsel.

JAMES E. PHILLIPS, JR.,
Special Counsel,
Of Counsel.

No. 407

In the
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H. L. HANCHEY, WARDEN,
LOUISIANA STATE PENITENTIARY,
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Petitioner,

v.

WOODMAN J. COLLINS,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

The petition for a writ of certiorari in this case was filed on August 19, 1964. On September 18, 1964, the United States Court of Military Appeals rendered its decision in *United States v. Crawford.* The opinion of the Court is reported in 15 USCMA at page 31. (Vol. 15 No. 3 Advance Opinions, October 5, 1964). One of the questions before the Court in *Crawford* was whether the deliberate inclusion of a Negro as a member of the Court convened to hear that particular case entitled the Negro defendant to a new trial. In denying Crawford a new trial the Court refused to follow the majority opinion of the Fifth Circuit Court of Appeals in this case. In this respect Chief

Justice Quinn as organ for the majority said at pages 40-41:

> "We turn to the intentional selection of a Negro to serve as a court member. Complaints about color or race in the selection of jurors normally deal with the *exclusion* of qualified persons solely on such irrelevant and prohibited bases. See Annotation, "Violation of constitutional rights of defendant in criminal case by unfair practices in selection of grand or petit jury," 82 L ed 1053. However, in *Collins v. Walker*, 329 F2d 100 (1964), the Court of Appeals for the Fifth Circuit granted a writ of *habeas corpus* on the ground the accused, a Negro, was unlawfully discriminated against when the panel of twenty grand jurors which indicted him was so organized as deliberately to *include* six Negroes. The court reasoned that the intentional inclusion of Negroes constituted "discrimination against . . . [the accused] because of his race or color." *Id.*, at page 105. With due respect to the learning and experience of the Court of Appeals, we think it misapprehended the fundamental difference between inclusion of a member of a particular group for the purpose of obtaining a fair representation of a substantial part of the community, and exclusion of members of that group so as to reduce the representational character of the jury. In *Avery v. Georgia*, 345 US 559, 562, 97 L ed 1244, 73 S Ct 891 (1953), which was relied upon by the Court of Appeals, the Supreme Court criticized the practice of using a white ticket to designate a prospective white juror, and a yellow ticket to indicate a Negro juror. However, the criticism was related to the established fact that no Negroes had been selected

for service over an extended period of time, although they numbered five percent of the jury list. The flagging of the tickets, together with the long continued failure to select a single Negro for service, was held to establish a *prima facie* case of *exclusion* of Negroes from jury duty. It was exclusion, not inclusion, that vitiated the selection process. In *Dow v. Carnegie-Illinois Steel Corporation*, 224 F2d 414 (CA 3d Cir) (1955), cert den 350 US 971, 100 L ed 842, 76 S Ct 442 (1956), the clerk deliberately tried to place more than one Negro juror on each panel. To achieve that purpose, the cards of eligible jurors were marked to show those who were Negro. The court pointed out that, unlike *Avery*, which was a case of exclusion, the inclusion of Negroes on the jury was designed "to insure a fair representation" of that class, and was, therefore, proper. *Dow v. Carnegie-Illinois Steel Corporation*, 224 F2d 414, supra, at pages 425-426. Accord: *United States v. Dennis*, 183 F2d 201, supra, at page 223; *United States v. Forest*, 118 F Supp 504 (ED Mo) (1954). If deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against, an accused. Equal protection of the laws is not denied, but assured. We hold, therefore, there was no error in the deliberate selection of a Negro to serve on the accused's court-martial.

Headnote 18

The decision of the board of review is affirmed."

The direct conflict between these two cases is clear and convincing evidence of the need for this Court

to grant the petition for a writ of certiorari in this case.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

BERNARD N. MARCANTEL,
District Attorney,
Thirty-First Judicial District,
State of Louisiana.

THOMAS W. McFERRIN,
Special Counsel.

JAMES E. PHILLIPS, JR.,
Special Counsel,
Of Counsel.

CERTIFICATE OF COUNSEL

I, Jack P. F. Gremillion, a member of the Bar of the United States Supreme Court, Attorney for H. L. Hanchey, Warden of the Louisiana State Penitentiary, do hereby certify that the foregoing supplement to petition for a Writ of Certiorari in this cause of in good faith and not merely for purpose of delay. I further certify that a copy of same has this day been forwarded to Stephen P. Coco and Herschel N. Knight, attorneys for respondent, Jennings, Louisiana.

Baton Rouge, Louisiana, this _____ day of October, 1964.

JACK P. F. GREMILLION,
Attorney General.